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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

Jacqueline Weaver, Substitute Administrator of
The Estate of EvaMae H. Hearn, Deceased,

Petitioner,

v.

Michael A. Hinshaw, M.D., General Surgeons, Inc.
and Reid Hospital & Health Care Services,

Respondents.

On Petition For Writ of Certiorari
To The Indiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

Karen Baxter Neiswinger
Attorney At Law
6100 N. Keystone Avenue
Suite #235
Indianapolis, IN 46220
Telephone: (317) 251-2250

Attorney For Petitioner

19 pp

A. Question Presented For Review

Whether the equal protection and due process rights of Petitioner, an African-American, and Ellen Mabry, the only available African-American venire person, were violated when the trial judge removed Ms. Mabry from the preassigned numerical queue and replaced her with a Caucasian juror, because she was late for jury duty, arriving during the trial court's general *voir dire* examination, but prior to the parties' *voir dire* examination.

B. Parties To the Proceeding in the Court Whose Judgment is Sought to be Reviewed:

Jacqueline Weaver, Substitute Administrator of the Estate of EvaMae Helouise Hearn, Deceased

Michael A. Hinshaw, M.D.

General Surgeons, Inc.

Reid Hospital & Health Care Services, Inc.

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E. Concise Statement of the Basis For Jurisdiction in the United States Supreme Court.

(I) Date the Judgment or Order Sought To Be Reviewed Was Entered

July 11, 2002	Order of the Indiana Supreme Court Denying Appellant's Petition To Transfer of Jurisdiction.

(ii) Date of Any Order Respecting Rehearing, or Extension of Time to File the Petition For A Writ of Certiorari:

Not Applicable.

(iii) Cross-Petition for a writ of Certiorari: Not applicable.

(iv) Statutory Provision Believed to Confer on this Court Jurisdiction to Review on a Writ of Certiorari the Judgment or Order in Question:

28 U.S.C. Sect. 1257.

Supreme Court Rule 10: The Indiana Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court. The Indiana Court of Appeals has decided an important question of federal law that conflicts with relevant decisions of this Court.

(v) Rule 29.4 notifications: Not Applicable.

F. Constitutional Provisions, Treaties, Statutes, Ordinances, and Regulations Involved in the Case:

Sixth Amendment to the Constitution of the United States. Appendix p. 55.

Fourteenth Amendment to the Constitution of the United States of America Appendix p. 55.

G. Concise Statement of the Case Setting Out the Facts Material to Consideration of the Questions Presented:

(I) Review of State Court Judgment

This is a medical malpractice wrongful death case originally brought by Robert Daniel Hearn, Administrator of the Estate of his wife, EvaMae Helouise Hearn, Deceased, in the Wayne County, Indiana, Superior Court 1. Jacqueline Weaver, the Decedent's only child, was substituted as Administratrix upon the death of Robert Daniel Hearn during the pendency of this appeal in Indiana. Petitioner and his wife were African-American. Persons summoned for jury duty were assembled in the courtroom and asked whether there were any hardship or other grounds that would prevent service as a juror. An African-American woman approached the bench and indicated that she was responsible for the care of her invalid mother and that she needed to be excused. She was excused. This event does not appear in the record. After excusing jurors due to hardship, the trial court commenced general *voir dire* questioning of the remaining persons who had been summoned for jury duty, all of whom were Caucasian.

At a point into the trial court's general *voir dire* of potential venire persons, (time involved is disputed by the parties) Ellen Rochelle Mabry, an African-American woman who had been summoned for jury duty, entered the courtroom and sat in the back of the room. The trial judge observed her arrival, but ignored her and continued asking general *voir dire* questions of the Caucasians who had been summoned for jury duty for an additional period of

time, when the bailiff interrupted and advised him that Ms. Mabry was present. The following is from the record of the proceedings commencing at the point when the bailiff interrupted the court's *voir dire*:

COURT BAILIFF:	Judge?
THE COURT:	Um?
COURT BAILIFF:	Ellen Mabrey (sic) is here.
COURT:	Okay.
COURT BAILIFF:	She hasn't been sworn yet.
THE COURT:	Is she still outside you say?
COURT BAILIFF:	No. (inaudible).
COURT BAILIFF:	Juror 395.
THE COURT:	And at what point did Miss Mabrey come in?
COURT BAILIFF:	She just came in a few minutes ago.
THE COURT:	I take it, ma'am, you've not been here for all my questions then.
JUROR MABREY:	(inaudible).
THE COURT:	Okay. Let me ask you if you could just sort of stand by for us and if you're

needed, why, we'll get to you, if not, maybe then you won't have to serve.

(Voir dire continues)

MS. NEISWINGER: Judge, may we approach the bench. (Unintelligible) Mabrey she was supposed to - she came ahead of Criscinda Elsrod. She's still not coming in.

THE COURT: That's the thing we need to make a bench conference or a bench comment on after we get the jury selected.

MS. NEISWINGER: Well, is she eliminated? Ms. Mabrey?

THE COURT: She was moved to the last – I told her that when she left the courtroom.

MS. NEISWINGER: She was what?

THE COURT: I excused - she was moved to the end of the panel. I've excused everything - everybody from the first eight on, which included

her, so - in other words, I indicated to you I was not willing to bring her in and go through everything we had to go through with all the other jurors so that she would be a part of the panel.

MS. NEISWINGER: (Unintelligible).

THE COURT: I know. We will.

(voir dire continues.)

THE COURT: Okay. I think, so we don't forget it, at 2:15, there was a bench conference at which plaintiff's counsel asked about Miss Mabrey. I've got to find her number here.

MS. NEISWINGER: She's number 395.

THE COURT: Okay. The question was why Ms. Elsrod was put into the jury box to replace, I think, it was Mr. Steele, who, at that time was excused and not Ms. Mabrey. Ms. Mabrey was not here when we started

voir dire examination, was not sworn with the other jurors and a portion, at least, of the Court's voir dire examination had already occurred at the time she entered the courtroom. Then, it was sometime before I was told who she was. I saw an individual enter, but I really didn't know who that person was. So when I was asked do we replace juror Steele with juror Elsrod (sic, should read "Mabry"), my response was no. To do that we would have had to stop all proceedings, go back, deal with juror Elsrod (sic) individually to get her up to the point where all the other jurors were in order to accomplish that. Since we're dealing with this many people's lives in selecting a jury, I elected not to do that. So, not whether you agree with my decision there or not, but is that a fair statement of what occurred during the bench conference?

MS. NEISWINGER: We agree - we agree that

Ms. Mabrey was over - was passed over, but she was not dismissed from these proceedings. Our objection is on the grounds that Ms. Mabrey is an African-American, my client is an African-American and the equal protection and due process clauses of the United States Constitution give him the right to have a jury that is fairly selected and to the maximum extent possible, representative of the community. She was present, we didn't believe that she missed much of the Court's voir dire that she could be brought up to speed rather quickly. She was passed over both in terms of replacing Mr. Steele, who was the employee of one of the defendants here, and also was passed up for the purposes of sitting as an alternate juror. And it is our contention that it would not have taken that much time to have asked her the voir dire questions and she only missed approximately, we - in my

estimation ten minutes or so of what the Court's questions were.

THE COURT: I totally disagree with that time estimate, but that's up to you, I guess.

MS. NEISWINGER: Well, but what the result is is that the jury, both in terms of the jurors and alternates, are now all white and this was an opportunity, at least, for us to have an opportunity to have an African-American juror on this jury, and for that reason, we objected at the time when Ms. Elsrod replaced Brian Steele. Ms. Elsrod was juror number 396. She replaced juror number 384. The next person in the queue and as I understand in our preparation for this trial was that the jurors were to be taken in the order in which their juror questionnaires are numbered and she was excluded from that list and we don't believe that the grounds comply with the Constitution's requirements

for his equal protection and due process rights and on that ground we objected, and we did object promptly when Ms. Elsrod was seated and also at the time when the alternate jurors were brought in and we believe that - that he was entitled to at least have the opportunity to have a representative of his own race sit on the jury or at least as an alternate.

THE COURT: I'll ask the defendants, was my statement a fair statement of the bench conference that occurred here?

MS. WATTS: Yes, Your Honor.

MR. WHALEY: The only - the only thing that I noticed, Your Honor, is that I think you used Ms. Elsrod's name once when you meant Ms. Mabrey's name.

MS. NEISWINGER: No, he said Ms. Elsrod is the one he put in place of Mister - Mr. Steele, that's what he said.

MR. WHALEY: Well, I think he said that at first and I just thought that the names got messed up later, but maybe I'm wrong.

THE COURT: Okay. I - it was Ms. Mabrey who came in late.

MR. WHALEY: Right.

THE COURT: Was not sworn and Ms. Neiswinger's right, I indicated that she should go out with the other jurors who were outside the courtroom. If we needed her services at the end, we would call upon her, otherwise we went ahead and I used Ms. Elsrod to replace Mr. Steele and that's - those are the names involved.

MR. SHUBAT: Judge, I would just like to put on the record that my - I wrote down that you started questioning the jurors at 1:20 and based upon her statement that she was here for 20 minutes or so, that means that she would have had to miss about 35 minutes rather than the ten at least

by my estimation.

THE COURT: Okay.

MS. NEISWINGER: To be honest, I wasn't watching the clock either time, but it didn't seem to be like she missed a massive amount of what had gone forward and I - we believe that she could have been given the oath and brought up to speed rather quickly considering that it's an important constitutional right and one that has been recognized by the United States Constitution - or the United States Supreme Court. And since it is a fundamental right, we felt that it was important to at least the opportunity be presented.

THE COURT: Anything further?

MS. NEISWINGER: I don't think so. Clyde, do you have anything further?

THE COURT: Yes or no?

MS. NEISWINGER: No, your Honor. I think we've already stated our objections. We did - I don't

think there is a dispute though, in case it should come to this later on, that we did make a timely objection at the time that Ms. Elsrod replaced Mr. Steele.

THE COURT: Your objection was at 2:15. I noted the clock and that's when we had the bench conference.

MS. NEISWINGER: Plus we also approached the bench at the time that the panel of potential alternates was brought in as well.

THE COURT: That's true.

MS. NEISWINGER: So we objected on both occasions.

THE COURT: Okay. All right. Can we go on then?

MS. NEISWINGER: Yes.

(End of hearing as it relates to Juror Mabrey).Transcript, pp. 29-34.

The all-Caucasian jury returned a verdict in favor of the Defendants in all respects on December 18, 2000, which was reduced to Judgment.

(Appendix, pp. 1-10). In the "Order Regarding Trial by Jury and Judgment," *Id*, the trial court judge stated the following: "The Court estimated that it had questioned prospective jurors for approximately 35 minutes at the time Ms. Mabry **entered** the courtroom" (Appendix, p.2, emphasis added). However, based upon the transcript, Petitioner contends that while Ms. Mabry may have *missed 35 minutes* of the court's general *voir dire*, she was not 35 minutes late in appearing for jury duty:

MR. SHUBAT:	Judge, I would just like to put on the record that my - I wrote down that you started questioning the jurors at 1:20 and based upon her statement that she was here for 20 minutes or so, that means that she would have had to miss about 35 minutes rather than the ten at least by my estimation.
THE COURT:	Okay.

Transcript p. 33, lines 20-26.

The foregoing exchange from the transcript indicates that Ms. Mabry may have been approximately 15 minutes late in arriving, and sat in the back of the courtroom for about 20 minutes more until the Bailiff interrupted the proceedings

While the parties dispute exactly how late Ms.

Mabry was, there is no dispute that the *voir dire* which she missed was a portion of the trial court's general *voir dire*. There is no dispute that the parties had not yet commenced their *voir dire* questioning of the venire panel when the above exchange occurred.

Petitioner filed a timely motion to correct errors on December 22, 2000, (Appendix, pp. 22-33) in which Petitioner argued that the removal of Ms. Mabry from consideration as a juror violated Petitioner's equal protection rights.(Appendix, pp. 30-31). The trial court denied Petitioner's motion to correct errors on January 11, 2001, without specifically addressing the merits of the issues raised. (Appendix, pp. 33-35). Petitioner filed notices of Appeal on February 9, and February 10, 2001.FN 1

Petitioner's brief and appendix were filed before the Indiana Court of Appeals on June 11, 2001. (Relevant excerpt, Appendix pp. 41-49). In Petitioner's brief, he argued that the trial court's exclusion of Ellen Mabry violated his Sixth and Fourteenth Amendment rights to equal protection and due process. (Appendix, pp. 42-49). The Indiana Court of Appeals issued a memorandum decision, not for publication, affirming the trial court in all respects on December 31, 2001. (Appendix, pp. 10-22).

FN 1 (Appendix, pp. 35-41). Note–this case was tried before the regular Judge of the Henry County, Indiana Circuit Court, sitting as Special Judge for Wayne County, Indiana Superior Court 1; in the interests of expediency, and by agreement, papers for this cause were filed in Henry County, under a Henry County cause number; however, the case was actually tried in Wayne County, Indiana; because of this two separate notices of appeal were filed in Henry and Wayne counties.

In the memorandum decision, the Indiana Court of Appeals repeated the trial judge's statement in the Order Regarding Trial by Jury and Judgment (Appendix, p. 2) that Ellen Mabry was 35 minutes late in appearing for jury duty, and stated that Petitioner's claim that she was 15 minutes late in arriving was an invitation to re-weigh the evidence, which it declined to do. (Appendix, p. 18, footnote 3; Memorandum Opinion, pp. 7-8, footnote 3). The Memorandum Opinion also stated, however, that "a determination of the exact amount of time that the juror was late is not essential to our determination of this issue..." (Appendix, p. 18; Memorandum Opinion, p. 8, footnote 3).

In support of its ruling, the Indiana Court of Appeals stated that a trial judge has a duty to conduct business expeditiously and consistent with the orderly procedure and administration of justice. (Appendix, p. 18; Memorandum Opinion, p. 7). The Indiana Court of Appeals held that the standard of review for a trial court's decisions regarding the orderly conduct of a trial was abuse of discretion. (Appendix, p. 18; Memorandum Opinion, p. 7). The court then discussed the Fourteenth Amendment right to equal protection, and stated that Petitioner had the burden to prove the existence of purposeful discrimination, citing *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986). (Appendix, pp. 19-20; Memorandum Opinion, pp. 8-9).

The court then proceeded to discuss Indiana case law which set forth the requirements for a *prima facie* case of racial discrimination in the process of jury selection, citing the Indiana case of *McCants v.*

State, 686 N.E.2d 1281 (Ind., 1997), in which the following must be established [following *Batson*]: (1) the excused juror is a member of a cognizable racial group; (2) the prosecutor has exercised peremptory challenges to remove that group's members from the jury; and (3) the facts and circumstances of the case raise an inference that the exclusion was based on race. (Appendix, p. 20; Memorandum Opinion, p. 9).

The court then stated that once a *prima facie* case is established, the burden shifts to the State to provide a race-neutral explanation for the challenge, and that "[i]f the explanation, on its face, is based on something other than race, the explanation will be deemed race-neutral." citing *McCants*, *supra*; (Appendix, p. 20, Memorandum Opinion, p. 9).

Applying this analysis, the Indiana Court of Appeals held that "...the Estate fails to demonstrate that the facts and circumstances of the case raise an inference that the placement of Mabry at the end of the venire panel was based on race. Rather, the trial court's placement of Mabry at the end of the venire panel was based upon her late arrival and the desire to conduct voir dire in an expeditious and orderly manner." (Appendix, pp. 20-21; Memorandum Opinion, p. 9).

Next, the court noted that under the recent Indiana Supreme Court case of *Ashabraner v. Bowers*, 753 N.E.2d 662 (Ind., 2001), a prima facie case of racial discrimination is established when a party removes the only African-American member of the venire. The court then stated it could not determine whether *Ashabraner* was applicable, because the

record does not state why the first African-American woman was dismissed prior to *voir dire*, an issue raised by Defendant, Reid Hospital, which argued that Ms Mabry was not the only potential African-American juror. (Appendix, p. 19, footnote 4; also p. 21; Memorandum Opinion, p.8, footnote 4, also, p. 10).

Nevertheless, the court stated that even if, arguendo, a prima facie case of racial discrimination had been established, the trial court's race-neutral explanation for bumping Ms. Mabry was sufficient, and therefore, the trial court did not abuse its discretion. (Appendix, pp. 21-22; Memorandum Opinion, pp. 10-11).

Petitioner filed a petition for rehearing on January 30, 2001, again raising equal protection and due process arguments, arguing that the mere quest for the orderly, expeditious conduct of a trial should be an insufficient ground to overcome the inference of racial discrimination, and that it was an abuse of discretion to deny Petitioner the opportunity to have a juror of his race serve on the jury just because she arrived late for jury duty. (Appendix, pp. 57-61). The Petition For Rehearing was denied by the Indiana Court of Appeals on February 27, 2002, without analysis. Petitioner filed his petition for transfer to the Indiana Supreme Court on April 1, 2002, (Appendix, pp. 61-65), reiterating his Fourteenth Amendment arguments (Appendix, pp.63-65), which was denied by Order dated July 11, 2002 that did not address the issues raised. (Appendix, pp. 65-66).

H. Argument

The trial court's removal of the only available African American potential juror, on the grounds that she missed a portion of the court's general *voir dire*, was arbitrary and denied the equal protection and due process rights of both Petitioner and the potential juror.

In *Swain v. Alabama*, 380 U.S. 202 (1965), this Court recognized that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." *Swain, supra*, 380 U.S. at 203-204.

That principle was reaffirmed by this Court in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed2d 69 (1986), when it held that the Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race or on the false assumption that members of his race as a group are not qualified to serve as jurors. *Batson* additionally established that the State unconstitutionally discriminates against the excluded person by denying him or her participation in jury service. *Batson* principles were applied to civil actions as a result of this Court's holding in *Edmonson v. Leesville Concrete Co*, 500 U.S. 614 (1991).

Batson also overruled that portion of *Swain v. Alabama* concerning the evidentiary burden placed on a defendant who claims that he has been denied equal protection through the State's discriminatory

use of peremptory challenges, and held that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case. *Batson*, 476 U.S. at 89-96.

In *Batson*, the prosecutor used peremptory challenges to strike all four of the black persons on the venire, with the result that the jury was composed solely of white persons, who voted to convict Batson. Before the jury was sworn, Batson's counsel moved to strike the panel, arguing that Batson's Sixth Amendment right to a jury drawn from a cross section of the community and Fourteenth Amendment right to equal protection had been violated. Although this case does not involve a party or a prosecutor using peremptory challenges to remove black venire persons, the reasoning and principles of *Batson* are applicable, since it was the actions of the trial judge who removed Ms. Mabry from consideration as a juror. As the following statement from the transcript demonstrates, the trial judge knew that removing Ms. Mabry from the pre-assigned queue would have the effect of eliminating her as a juror:

> I excused - she was moved to the end of the panel. I've excused everything - everybody from the first eight on, which included her, so - in other words, I indicated to you I was not willing to bring her in and go through everything we had to go through with all the other jurors so that she would be a part of the panel.
>
> Transcript, p. 30, lines 8-13

In *Batson*, this Court acknowledged that the Constitution requires the Court to "look beyond the face of the statute defining juror qualifications and also consider challenged selection practices to afford 'protection against action of the State through its administrative officers in effecting the prohibited discrimination.' *Norris v. Alabama, supra*, at 589; [*19) see *Hernandez v. Texas*, 347 U.S. 475, 478-479 (1954); *Ex parte Virginia, supra*, at 346-347:

> Thus, the Court has found a denial of equal protection where the procedures implementing a neutral statute operated to exclude persons from the venire on racial grounds, n 10 and has made clear that the Constitution prohibits all forms of purposeful racial discrimination in selection of jurors. N 11 While decisions of this Court have been concerned largely with discrimination during selection of the venire, the principles announced there also forbid discrimination on account of race in selection of the petit jury. Since the Fourteenth Amendment protects an accused throughout the proceedings bringing him to justice *Hill v. Texas*, 316 U.S. 400, 406 (1942), the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at 'other stages in the selection process,' *Avery v. Georgia*, 345 U.S. 559, 562 (1953); see *McCray v. New York, supra*, at 965, 968 (MARSHALL, J., dissenting from denial of certiorari); see also *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972).
>
> Accordingly, the component of the jury

> selection process at issue here, the State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause. *Batson, supra*, 476 U.S., at 88-89

In *Washington v. Davis*, 426 U.S., at 242, this Court noted that "total or seriously disproportionate exclusion of Negroes from jury venires, may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on non-racial grounds."

In *Batson*, this Court observed that *prima facie* discrimination was found on proof that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing "the opportunity for discrimination." *Batson, supra*, 476 U.S., at 95, citing *Whitus v. Georgia, 385 U.S. at 552, Castaneda v. Partida,430 U.S. at 494*, Washington v. Davis, *426 U.S. at 241* , Alexander v. Louisiana, *405 U.S. at 629-631.*

To establish a *prima facie* case of purposeful discrimination in selection of the petit jury, the defendant first must show that he is a member of a cognizable racial group. *Castaneda v. Partida*, 430 U.S. at 494, "..and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those

to discriminate who are of a mind to discriminate.' *Avery v. Georgia*, 345 U.S. at 562. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination." *Batson, supra*, 476 U.S., at 96.

Applying these principles to the facts of this case, it is clear that the first prong of the *Batson* analysis is met, since Petitioner and Ellen Mabry were both African-American. As to the second and third prongs, Petitioner submits that the trial court's arbitrary removal of the only available black venireperson, "constitute[s] a jury selection practice that permits 'those to discriminate who are of a mind to discriminate", and "raises the necessary inference of purposeful discrimination", *Avery*, 345 U.S. at 562; *Batson*, 476 U.S. at 96, for the reasons explained *infra*.

The trial judge ignored Ellen Mabry when she entered the courtroom, and would in all likelihood have continued ignoring her if the bailiff had not interrupted the proceedings. At the point when she was brought to the judge's attention, it was clear that he had no intention of allowing her to serve:

COURT BAILIFF: Judge?

THE COURT: Um?

COURT BAILIFF: Ellen Mabrey (sic) is here.

COURT: Okay.

COURT BAILIFF: She hasn't been sworn yet.

THE COURT: Is she still outside you say?

COURT BAILIFF: No. (inaudible).

COURT BAILIFF: Juror 395.

THE COURT: And at what point did Miss Mabrey come in?

COURT BAILIFF: She just came in a few minutes ago.

THE COURT: I take it, ma'am, you've not been here for all my questions then.

JUROR MABREY: (inaudible).

THE COURT: Okay. Let me ask you if you could just sort of stand by for us and if you're needed, why, we'll get to you, if not, maybe then you won't have to serve.

(Voir dire continues)

MS. NEISWINGER: Judge, may we approach the bench. (Unintelligible) Mabrey she was supposed to - she came ahead of Criscinda Elsrod. She's still not coming in.

THE COURT: That's the thing we need to make a bench conference or a bench comment on after we get the jury selected.

MS. NEISWINGER: Well, is she eliminated? Ms. Mabrey?

THE COURT: She was moved to the last – I told her that when she left the courtroom.

MS. NEISWINGER: She was what?

THE COURT: I excused - she was moved to the end of the panel. I've excused everything - everybody from the first eight on, which included her, so - in other words, I indicated to you I was not willing to bring her in and go through everything we had to go through with all the other jurors so that she would be a part of the panel.

Transcript, p. 29, lines 5-26; p. 30,lines 1-13

In addition to immediately removing her from her preassigned position, the transcript establishes that the trial judge made no effort to ascertain why Ms. Mabry was late, or whether circumstances beyond her control prevented her from arriving sooner. Therefore, Petitioner was summarily denied any opportunity to have a juror of his own race, and Ms. Mabry was denied her right to participate in the judicial process on the arbitrary basis that she was not physically present in the courtroom at the appointed time, no explanations or exceptions allowed. Further on this point, it bears mentioning that although Ms. Mabry arrived after the start of general *voir dire*, one of the reasons she missed a portion at least of the trial court's general *voir dire* is that the trial judge ignored her, and the bailiff failed to interrupt the proceedings until after she had sat in the back of the courtroom for an additional period of time after arriving. Therefore, at least part of the cause for any delay that would have been incurred by repeating part of the court's general *voir dire* was the fault of the trial judge and bailiff. The transcript establishes that the trial judge gave no consideration to this fact, and that his major concern was that the white jurors should not be inconvenienced by waiting while he individually questioned Ms. Mabry:

> Ms. Mabrey was not here when we started voir dire examination, was not sworn with the other jurors and a portion, at least, of the Court's voir dire examination had already occurred at the time she entered the courtroom. Then, it was sometime before I was told who she was. I

> saw an individual enter, but I really didn't know who that person was. So when I was asked do we replace juror Steele with juror Elsrod (sic–should read "Mabry"), my response was no. To do that we would have had to stop all proceedings, go back, deal with juror Elsrod (sic–should read "Mabry") individually to get her up to the point where all the other jurors were in order to accomplish that. Since we're dealing with this many people's lives in selecting a jury, I elected not to do that.
>
> Transcript, pp. 30-31.

Petitioner submits that if you insert an adjective listing the race of Ellen Mabry and "all the other jurors" into the foregoing scenario, plus the argument *supra*, the totality of the facts surrounding the elimination of Ellen Mabry as a juror are sufficient to constitute an inference of racial discrimination pursuant to *Batson* principles.

When the inference of discrimination has been established, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Batson, supra*, 476 U.S., at 97. The prosecutor may not rely upon a claim of his "assumption - or his intuitive judgment" that a black venireperson would be partial to a black defendant on account of race. *Id.* Likewise inadequate is the mere denial by the prosecutor of a discriminatory motive, or the affirmation of his good faith in making individual selections. *Id; Alexander v. Louisiana*, 405 U.S., at 632. "If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal

Protection Clause 'would be but a vain and illusory requirement.' *Norris v. Alabama, supra,* at 598." *Batson, supra,* at 476 U.S., p. 98.

The result here "bespeaks discrimination", (*See Hernandez v. Texas*, 347 U.S. at 482), since the trial judge arbitrarily eliminated any chance for Petitioner to have a member of his race serve on the jury on the grounds that it would be inconvenient to make the white venire persons wait while he repeated some of his preliminary *voir dire* questions for one black venire person. Petitioner submits that requiring the remaining venire to wait, sometimes in another room, while one potential juror is questioned is not an unusual occurrence. This can happen, for example, when there are sensitive issues regarding the potential juror, such as being the victim of a sex crime, prior knowledge of one of the parties, attorneys or a key witness, and for a variety of other reasons. As a generality, persons called for jury duty are frequently required to wait, sometimes for hours, for many different reasons, some of which are under the court's control, and some of which are not. For example, venire persons must check in when they appear for jury duty and wait until they are instructed to go to a particular courtroom. Prospective jurors frequently must wait while a list of those appearing for jury duty is compiled and compared with the list of those summoned to appear, so that the order of the actual venire can be ascertained. Waiting also frequently happens while juror questionnaires are filled out, assembled, copied, collated, distributed to and reviewed by attorneys, and when jurors excused from one court are held to see if they are needed in another. Waiting also can occur when an insufficient

number of prospective jurors appear for jury duty and other persons must be immediately summoned to appear. It is also not unusual for prospective jurors to wait while preliminary motions are argued to the court, while parties to the proceeding suddenly get serious about settlement, and for numerous other reasons.

Petitioner submits that the argument that keeping the other jurors waiting while some of the preliminary questions were repeated to Ms. Mabry is an insufficient reason to deny her and Petitioner at least the opportunity for her to be selected as a juror in this case. This is especially true considering that part of the reason she missed at least pt of the court's general *voir dire* was the fault of the trial judge and bailiff.

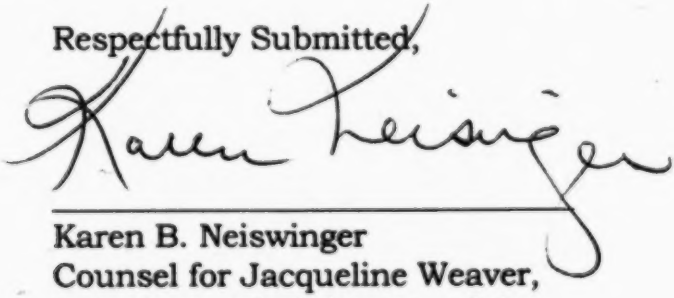
The Indiana Court of Appeals therefore erred when it held that Petitioner failed to meet his burden of demonstrating purposeful discrimination required to violate the Fourteenth Amendment because the trial judge had a "race neutral explanation for placing Mabry at the end of the venire panel". (Memorandum Opinion, p. 10; Appendix, p. 21). This Court has repeatedly found that mere denials of a discriminatory intent and allegations of good faith are insufficient to overcome a prima facie inference of racial discrimination. *Alexander, supra; Norris, supra; Batson, supra.*

Likewise erroneous was the reasoning of the Indiana Court of Appeals that "...a trial judge has control over the proceedings in his court, and his duty is to conduct business expeditiously and consistent

with the orderly procedure and administration of justice. Id at 847. We will review the trial court's decisions regarding the orderly conduct of a trial for an abuse of discretion." (Memorandum Opinion at p. 7; Appendix, p. 18). A trial judge simply does not have the discretion to deny an African American litigant or venire person their rights to equal protection and due process under the rubric of "[m]atters which relate to the orderly conduct of trial [that] are generally within the trial court's discretion." (Memorandum opinion, p. 7; Appendix, pp. 17-18). If such were the law, then the Equal Protection and Due Process rights guaranteed by the Constitution would be meaningless. Virtually any discriminatory or unlawful denial of a black person's rights could arguably be justified under the rationale that the trial judge was merely exercising his discretion to conduct court business "expeditiously" and in an "orderly" fashion.

Petitioner respectfully requests this Court to grant her petition for a writ of certiorari.

Respectfully Submitted,



Karen B. Neiswinger
Counsel for Jacqueline Weaver,
Substitute Administrator of the
Estate of EvaMae H. Hearn.

Supreme Court, U.S.
FILED
FEB 18 2003

No. 02-944

IN THE

Supreme Court of the United States

JACQUELINE WEAVER, Substitute Administrator of The Estate of EVAMAE H. HEARN, Deceased,

Petitioner,

v.

MICHAEL A. HINSHAW, M.D., GENERAL SURGEONS, INC., and REID HOSPITAL & HEALTH CARE SERVICES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, FIRST DISTRICT

BRIEF IN OPPOSITION

KARL L. MULVANEY
MARY HAMILTON WATTS
NANA QUAY-SMITH
CANDACE L. SAGE
BINGHAM MCHALE, LLP
10 West Market Street
Suite 2700
Indianapolis, IN 46204
(317) 635-8900

Attorneys for Respondents Michael A. Hinshaw, M.D. and General Surgeons, Inc.

L. ALAN WHALEY
Counsel of Record
ICE MILLER
One American Square
Box 82001
Indianapolis, IN 46282-0002
(317) 236-2100

Attorney for Respondent Reid Hospital & Health Care Services

179171

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED FOR REVIEW

Whether the petitioner has presented any evidence that the trial court judge acted with an improper, racially-discriminatory motive in re-assigning a late-arriving African-American venire person to the end of the jury pool, rather than begin *voir dire* examination over.

PARTIES TO THE PROCEEDINGS AND STATEMENT PURSUANT TO RULE 29.6

The parties to the proceedings below are listed in the caption. Respondent General Surgeons, Inc. is a privately-held corporation. Respondent Reid Hospital & Health Care Services is a private, non-profit corporation.

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Washington v. Davis, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976) 3, 8

REASONS FOR DENYING THE PETITION

The petition should be denied because it does not meet the Court's criteria for reviewing a case on a writ of certiorari. The petition does not present a novel issue of federal law. On the contrary, the Indiana Court of Appeals rendered the decision challenged by the petitioner in a way that was completely consistent with United States Supreme Court precedent.

The petitioner contends that in the trial of her predecessor Administrator's medical malpractice claim, the trial court committed an equal protection violation by re-assigning a late-arriving African-American venire person to the end of the jury pool. The petitioner argues that the trial judge should have seated the venire person, Ellen Mabry, in her pre-assigned seat and started the court's *voir dire* questioning (which had been going on for approximately 15-35 minutes) over. She further argues that any inconvenience this would have caused the court and the other members of the venire was outweighed by the plaintiff's and Ms. Mabry's interests in having an African-American be eligible for jury service.

All these arguments miss the mark, and the petitioner's equal protection claim fails, because she has not shown that the trial court acted with discriminatory intent when it re-assigned Ms. Mabry. This Court's precedents make it clear that such discriminatory intent must be established for a plaintiff to assert an equal protection claim. The Indiana Court of Appeals correctly found that the petitioner had not met her burden of proof on this point.

The petitioner invokes the principles enunciated in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and related cases in support of her position. In *Batson*, this Court held that during jury selection a state prosecutor could not exercise his peremptory challenges in a racially-discriminatory way in order to exclude people of a racial minority from the jury.

Batson was a criminal case, but its holding has been extended to civil cases. In *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991), this Court held that a private litigant may likewise not use peremptory challenges to discriminate against venire persons based on race. The Court found that the government was so involved with the jury selection process that the use of peremptory challenges constituted state action, even though those challenges were exercised by a private party.

The facts of this case differ from those in *Edmonson* in that it is not a party's peremptory challenge that is at issue, but a trial judge's action in administering the jury selection process. For some of the same reasons that were persuasive to the majority in *Edmonson*, however, it is appropriate to apply a *Batson* analysis to this case. The *Edmonson* court noted that the use of peremptory challenges required the participation of the presiding judge, "who beyond all question is a state actor," 500 U.S. at 624, 111 S. Ct. at 2085, 114 L. Ed. 2d at 675. Moreover, if discrimination on racial grounds is improper for a state prosecutor or a private civil litigant, then it certainly is not less so for a state court judge.

Thus, for the purposes of this certiorari petition, the respondent agrees that applying a *Batson* analysis is reasonable. The petitioner nevertheless fails to meet the burden of establishing discriminatory intent that *Batson* imposes.[1]

Under *Batson* and cases applying it, there is a three-step process to assess whether a peremptory challenge was discriminatory. First, the party attacking the challenge (the petitioner here) must establish a *prima facie* case of discriminatory intent. If that is accomplished, the party that made the challenge must offer a race-neutral explanation in the second step of the process. In the third step, the court evaluates the reasonableness and persuasiveness of the explanation and decides whether the peremptory challenge stands as valid or is disallowed as racially-motivated. *Batson*, 476 U.S. at 93-94, 106 S. Ct. at 1721, 90 L. Ed. 2d at 85-86. *Purkett v. Elem*, 514 U.S. 765, 767, 115 S. Ct. 1769, 1771, 131 L. Ed. 2d 834, 839 (1995); *Hernandez v. New York*, 500 U.S. 352, 358-59, 111 S. Ct. 1859, 1865-66, 114 L. Ed. 2d 395, 405 (1991).

---

1. Of all the United States Supreme Court decisions cited in the petition, only *Batson* and *Edmonson* are apposite. With three exceptions, all of the rest involve state methods for selecting jury pools and grand juries, and are therefore of little use under the facts of this case. The three others are similarly of little or no help, based on their facts. *Washington* v. *Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976), dealt with an allegedly-discriminatory test that was part of an application for employment in the District of Columbia police department. *McCray v. New York*, 461 U.S. 961, 103 S. Ct. 2438, 77 L. Ed. 2d 1322 (1983), a precursor to *Batson*, was denied certiorari by this Court. *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), was superseded (at least as far as this petition is concerned) by *Batson*.

Within the first step of this process, this Court has also set out a tripartite evaluation method. *Batson* holds that in order for the petitioner here to establish a *prima facie* case of purposeful discrimination, she must show that her predecessor Administrator, the plaintiff in the medical malpractice case below, was a member of a cognizable racial group; that members of his race were removed from the venire; *and that the facts and circumstances generally raise the inference that the removal was racially motivated. Batson*, 476 U.S. at 96, 106 S. Ct. at 1723, 90 L. Ed. 2d at 87-88.

Applying this test, the petitioner fails to establish a *prima facie* case of discriminatory intent. The first of the three elements exists in that the petitioner's predecessor Administrator was African-American. One could quibble that the second element has not been established, in that Ms. Mabry was not "removed" from the venire, but was shifted to the end of the pool when she arrived late, so as to avoid starting the *voir dire* process over. However, thus re-assigning Ms. Mabry did significantly decrease her chances of being selected to this particular jury, so for the purposes of this petition one may assume that the second element is established.

But the petitioner's claim founders on the third element of the test, because the facts and circumstances of Ms. Mabry's re-assignment do not imply a racial bias. The record before the Court makes clear that the trial court judge asked Ms. Mabry to "stand by," re-assigning her to the end of the venire, for no reason other than the fact she had arrived late and had not heard all of the judge's *voir dire* questions. (*See* Petition at pp. 6-7.) These circumstances do not support, or even permit, an inference that the trial judge was motivated by a racial bias. On the contrary, it is clear that the judge was

motivated by a desire to conduct the trial generally, and the *voir dire* process specifically, in an efficient manner.[2]

There is thus an absence of any evidence supporting an inference of racial bias on the part of the trial judge. The petitioner has therefore failed to establish a *prima facie* case of racial discrimination, which should bring this Court's review to an end.

However, even if one presumes *arguendo* that the petitioner has established a *prima facie* case (the first of the three *Batson* steps), she fails to satisfy all three *Batson* steps, as explained below.

---

2. When evaluating the "facts and circumstances" of the trial judge's decision in this case, it is worth noting that there are differences between a judge's position and a prosecutor's. First, there is less reason to question a judge's motive in re-assigning a prospective juror than a prosecutor's motive in exercising a peremptory strike. The prosecutor's strike may be presumed to be used to gain what the prosecutor thinks might be an advantage in the case. If race is an element of the case, the strike may rationally be scrutinized to see if it is racially motivated. By contrast, there is no reason to presume that the judge is acting in an attempt to favor either side.

Second, this Court has recognized that it should be deferential to a trial court's factual findings about whether intentional discrimination existed. *See, e.g., Batson*, 476 U.S. at 98-99, 106 S. Ct. at 1724, 90 L. Ed. 2d at 89, nn.21, 22 ("Certainly, this Court may assume that trial judges, in supervising *voir dire* . . . will be alert to identify a prima facie case of purposeful discrimination."). It follows that — especially in situations such as this, where there is no evidence suggesting that the trial judge had an improper bias — there is no reason to scrutinize his decision with heightened suspicion.

The second *Batson* step calls for the party that exercised the peremptory challenge — by analogy, the trial judge in this case — to offer a race-neutral explanation for the challenge. Here, the trial judge was not called upon to give the kind of "explanation" that a prosecutor would in order to justify a peremptory challenge, but in responding to the plaintiff's objection during a bench conference, he clearly gave a race-neutral explanation for his decision to re-assign Ms. Mabry. His remarks are quoted at pp. 6-7 of the petition. He stated that his decision was based on the fact that Ms. Mabry arrived late, missing a portion of his *voir dire* questioning. To place Ms. Mabry in her pre-assigned seat would have required that the *voir dire* proceedings be started over from the beginning, and "[s]ince we're dealing with this many people's lives in selecting a jury, I elected not to do that." (*See* Petition at p. 7.)

This Court's precedent states that the explanation at this second *Batson* stage need not be ultimately persuasive, or even plausible, in order to satisfy the second step and shift the burden of persuasion back to the petitioner. *E.g.*, *Purkett*, *supra*, 514 U.S. at 767-68, 115 S. Ct. at 1771, 131 L. Ed. 2d at 839; *see also Hernandez*, *supra*, 500 U.S. at 360, 111 S. Ct. at 1866, 114 L. Ed. 2d at 406. Here, however, the trial judge's explanation is more than merely plausible or persuasive — it is convincing. He clearly articulated a reason based on timeliness, efficiency, and consideration for the schedules of the venire members who had arrived on time.

In any event, the explanation is indisputably sufficient to satisfy the second *Batson* step and move the analysis to the third step, under which the burden of persuasion shifts back to the petitioner. In the third step, the persuasiveness of

the explanation is evaluated. *Purkett* again provides guidance as to how that evaluation should be conducted. The *Purkett* opinion noted that, under *Batson*, the explanation must be "clear and reasonably specific" and offer "legitimate reasons" for the decision; it must go beyond a mere denial of an improper discriminatory motive; and it must be "related to the particular case to be tried." *Id.*, 514 U.S. at 768-69, 115 S. Ct. at 1771, 131 L. Ed. 2d at 839-40. The trial judge's explanation meets and exceeds all these criteria. The judge did not merely deny a race-based motivation — he explained that his decision was based on the fact that Ms. Mabry had arrived late, after the *voir dire* questioning had already started, and that he did not want to stop the proceedings and start over from the beginning simply because one additional venire person had arrived. This rationale is clear, specific, legitimate, and related to the particular case. It completely refutes any inference of a discriminatory motive. It follows that the petitioner has utterly failed to meet her burden of persuasion that the judge's decision was racially motivated. Simply stated, the judge's reason was race-neutral.

Perhaps mindful of this, the petition avoids taking its analysis completely through the three-step *Batson* process. Instead, it attempts to shift the focus away from motivation or intent (which the petitioner cannot prove) to racially-disparate *impact* by contending that when she was re-assigned Ms. Mabry was the only African-American in the venire. The petitioner also makes the argument that the trial judge's concerns about running jury selection efficiently and avoiding inconvenience to the other potential jurors are "insufficient" reasons for re-assigning a late-arriving venire member.

These arguments miss the point. It is well settled that in a *Batson*-type challenge, "[a]s in any equal protection case," *id.*, 476 U.S. at 93, 106 S. Ct. at 1721, 90 L. Ed. 2d at 85, the standard is discriminatory intent, not disparate impact. *See, e.g., Hernandez*, 500 U.S. at 359-60, 111 S. Ct. at 1866, 114 L. Ed. 2d at 406-07; *Washington v. Davis*, 426 U.S. 229, 239, 96 S. Ct. 2040, 2047, 48 L. Ed. 2d 597, 607 (1976). Thus, whether Ms. Mabry was the sole African-American in the jury pool when she arrived and was re-assigned is not relevant. What is relevant is whether her status as an African-American was the *reason* she was re-assigned. As the record here amply demonstrates, it was not; timeliness was.

Similarly, the petitioner's argument that the judge should have balanced the inconvenience of the other venire members against the plaintiff's and Ms. Mabry's interest in having an African-American as a potential juror is unavailing. This argument is unsupported by any citation to legal authority in the petition, and it is another example of ignoring the pertinent standard — intent — while seeking to substitute another — balancing or weighing interests. There is no legal support for this attempt by the petitioner. Discriminatory intent remains the essential element she must prove, and she has failed to do so.

The Indiana Court of Appeals, in its Memorandum Decision of December 31, 2001 (Petitioner's Appendix pp. 10-22), correctly observed that the petitioner essentially conceded that she could not establish discriminatory intent when she argued that it was the trial court's *concern for convenience* that had the *effect* of excluding the only African-American venire member. (*See* Petitioner's Appendix at pp. 21-22.) Concern for convenience is not an improper

motivation under *Batson*. The effect that the judge's decision had on the racial makeup of the jury is not the issue. Whether the judge had an impermissible, racially-discriminatory intent is the issue, on which the petitioner bears the burden of proof. The record shows that the judge's reasons for his decision were clearly not race-based or discriminatory in intent. The petitioner has failed to meet her burden of proving otherwise.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

KARL L. MULVANEY
MARY HAMILTON WATTS
NANA QUAY-SMITH
CANDACE L. SAGE
BINGHAM MCHALE, LLP
10 West Market Street
Suite 2700
Indianapolis, IN 46204
(317) 635-8900

Attorneys for Respondents Michael A. Hinshaw, M.D. and General Surgeons, Inc.

L. ALAN WHALEY
Counsel of Record
ICE MILLER
One American Square
Box 82001
Indianapolis, IN 46282-0002
(317) 236-2100

Attorney for Respondent Reid Hospital & Health Care Services

Supreme Court, U.S.
FILED

02 944 OCT 9 2002

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In The

Supreme Court of the United States

Jacqueline Weaver, Substitute Administrator of
The Estate of EvaMae H. Hearn, Deceased,

Petitioner,

v.

Michael A. Hinshaw, M.D., General Surgeons, Inc.
and Reid Hospital & Health Care Services,

Respondents.

On Petition For Writ of Certiorari
To The Indiana Supreme Court

APPENDIX OF PETITIONER

Karen Baxter Neiswinger
Attorney At Law
6100 N. Keystone Avenue
Suite #235
Indianapolis, IN 46220
Telephone: (317) 251-2250

Attorney For Petitioner

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Order Regarding Trial By Jury and Judgment

STATE OF INDIANA) IN THE HENRY CIRCUIT
)COURT
) SS:
COUNTY OF HENRY) 2000 TERM
CAUSE NO. 33C01-9311-CT-026

ROBERT D. HEARN,
AS HUSBAND AND
ADMINISTRATOR OF THE
ESTATE OF EVA MAE H.
HEARN

Filed
Dec 18 2000
Linda S. Ratliff
Clerk Henry
Circuit Court

VS

MICHAEL A. HINSHAW, MD..,
GENERAL SURGEONS, INC.
AND REID HOSPITAL AND
HEALTH CARE SERVICES

ORDER REGARDING TRIAL BY JURY
AND JUDGMENT

(P. 1) On December 11, 2000, Plaintiff, Robert Daniel Hearn, appeared in person and by counsel, Karen Neiswinger and Clyde Williams, attorneys. Defendant, Michael A. Hinshaw, M.D., appeared in person and by counsel, Mary Watts and John Shubat, attorneys. Defendant, Reid Hospital and Health Care Services, appeared by representative and by counsel, L.A. Whaley, attorney. Following a hearing upon pending motions, members of the regular venire of jurors for this term of Wayne Superior Court No. 1 appeared and were duly sworn to well and truly answer questions concerning their competency to serve. The

Court and the parties by counsel examine (sic) said prospective jurors as to competency.

The Plaintiff exercised peremptory challenges to prospective jurors, Joan Mann and Timothy Wise. Defendants exercised a peremptory challenge to prospective juror, Sherry Wayne.

Prospective jurors, Kevin Land, Kenneth Johnson and Loraine Dunn, were each excused for cause on Plaintiff's motion. Prospective juror, Melody Anderson, was excused by agreement of the parties.

In selecting two alternate jurors, the Plaintiff exercised a peremptory challenge to Shelba Bowne. The Defendants exercised a peremptory challenge to prospective juror, Rick Moles.

The jury selected was duly sworn to well and truly try the issues in this cause and consisted of the following individuals, to-wit: Crescinda Leigh Elsrod, Michael Charles Tabeling, Lonnie D. Lawhorn, Mary Patricia Shuck, Jo Haisley and Victoria Sue Brim. Alternate jurors were: Emmett Webb and Dale Tibbot.

Prospective juror #3395, Ellen Rochelle Mabry, appeared late for jury selection. Ms. Mabry entered the courtroom after the Court had commenced its general voir dire examination of jurors. The Court estimated that it had questioned prospective jurors for approximately 35 minutes at the time Ms. Mabry entered the courtroom. At the conclusion of the Court's questioning of prospective jurors, the Court informed the Bailiff that Ms. Mabry should wait until the jury was selected. However, the Court indicated to the

Bailiff that it would not swear Ms. Mabry and conduct an individual approximate 35 minute inquiry with her, while other jurors waited. The Court determined that if Ms. Mabry was needed for jury selection, it would conduct a full individual voir dire with her at that time.

A jury was selected. At the time Kevin Land was excused for cause, the Court replaced Mr. Land with Crescinda Elsrod. At that time, Plaintiff's counsel objected that prospective juror Land should have been replaced with prospective juror Mabry. The Court declined to do that. Plaintiff argues that Juror Mabry, an African American, is of the same race as the Plaintiff, Robert Daniel Hearn, and that the Court's refusal to accommodate Ms. Mabry by conducting an individual voir dire examination when she appeared late for jury selection, served to violate the Plaintiff's right to due process. The Court proceeded with jury selection. Ultimately, the services of Ms. Mabry were not required and she was discharged along with five other prospective jurors.

Defendants hinshaw and General Surgeons, Inc.'s Motion for Separation of Witnesses was sustained and the Court entered an Order separating witnesses on record in open court.

Defendants Hinshaw and General Surgeons, Inc.'s Motion to File Original Depositions was sustained and the Court ordered the filing of the original depositions of the following: John Short, M.D., Solomon Grinspan, M.D., Paul Patterson, Bernard Bogar, Ph.D., Michael C. Dalsing, M.D., Mark A. Edwards, M.D. and Dean A. Hawley, M.D.. Trial was recessed to December 12, 2000, at 9:00 a.m..

On December 12, 2000, the Plaintiff, Robert Daniel Hearn, appeared not. Attorneys Karen Neiswinger and Clyde Williams, appeared on behalf of the Plaintiff. Defendant, Michael A. Hinshaw, M.D., appeared in person. Defendant Hinshaw and Defendant General Surgeons, Inc., appeared by counsel, Mary Watts and John Shubat, attorneys. Reid Hospital and Health Care Services, appeared by representative and counsel, L.A. Whaley, attorney.

The Court , out of the jury's presence, gave to the parties, in writing, its proposed preliminary instructions in the cause numbered 1 through 8, as to the issues for trial, the burden of proof, the credibility of witnesses and the manner of weighing testimony to be received. Plaintiff tendered an issue instruction and seven (7) requests for the giving of pattern instructions.

Defendants Hinshaw and General Surgeons, Inc., tendered their preliminary instructions numbered 1 through 8. Defendant Reid Hospital tendered its preliminary instructions numbered 1 through 7.

The parties indicated that they had no objection to the giving of the Court's preliminary instructions numbered 1 through 8. The Court determined that each of the preliminary instructions tendered or requested by the parties were covered by the Court's preliminary instructions. Accordingly, the Court indicated that it would refuse each of the parties' tendered preliminary instructions.

The parties appeared in person, by representative and by counsel and the jury appeared, and the Court instructed the jury by reading its

preliminary instructions numbered 1 through 8 inclusive as heretofore indicated. The Court orders that each of its preliminary instructions and those tendered by the parties be made a part of the record in this cause. The Plaintiff commenced his evidence in chief. Trial was recessed to December 13, 2000, at 9:00 a.m..

On December 12, (sic) 2000, the Plaintiff, Robert Daniel Hearn, appeared not. Attorneys Karen Neiswinger and Clyde Williams, appeared on behalf of the Plaintiff. Defendant, Michael A. Hinshaw, M.D., appeared in person. Defendant Hinshaw and Defendant General Surgeons, Inc., appeared by counsel, Mary Watts and Johnn (sic) Shubat, attorneys. Reid Hospital and Health Care Services, appeared by representative and counsel, L.A. Whaley, attorney. Plaintiff continues with evidence in chief. Dr. Garnet, a defense witness, was called out of order. Trial was recessed to December 14, 2000, at 9:00 a.m..

On December 14, 2000, the Plaintiff, Robert Daniel Hearn, appeared not. Attorneys Karen Neiswinger and Clyde Williams, appeared on behalf of the Plaintiff. Defendant, Michael A. Hinshaw, M.D., appeared in person. Defendant hinshaw and Defendant General Surgeons, Inc., appeared by counsel, Mary Watts and Johnn (sic) Shubat, attorneys. Reid Hospital and Health Care Services, appeared by representative and counsel, L.A. Whaley, attorney. Plaintiff continues with evidence in chief. Dr. Gabrielsen, a defense witness, was called out of order. Dr. Steven Miller, a defense witness, was called out of order. Trial was recessed to December 15, 2000, at 9:00 a.m..

On December 15, 2000, the Plaintiff, Robert Daniel Hearn, appeared not. Attorneys Karen Neiswinger and Clyde Williams, appeared on behalf of the Plaintiff. Defendant, Michael A. Hinshaw, M.D., appeared in person. Defendant Hinshaw and Defendant General Surgeons, Inc., appeared by counsel, Mary Watts and Johnn (sic) Shubat, attorneys. Reid Hospital and Health Care Services, appeared by representative and counsel, L.A. Whaley, attorney. The Plaintiff, by counsel, rested his case in chief, subject to calling the Plaintiff, Robert Daniel Hearn, who had become hospitalized during the course of the trial. Defendants, Michael A. Hinshaw, M.D. and General Surgeons, Inc., commenced their case in chief. Trial was recessed to December 18, 2000, at 9:00 a.m..

On December 16, 2000, the parties appeared by counsel to present arguments relating to objections contained within the deposition of Dr. George Nichols, M.D., which was taken February 2, 1999. Further, out of the jury's presence, the Court gave to counsel the Court's proposed final instructions numbered 1 through 9, 9-A, 9-B and 10 through and including 30. Plaintiff tendered his proposed final instructions numbered 1 through 17 inclusive. Defendants Hinshaw and General Surgeons, Inc., tendered their proposed final instructions numbered 1 through and including 23; and, Defendant Reid Hospital tendered its final instructions numbered 1 through and including 20.

Of the Court's proposed final instructions, counsel indicated theat they had no objection to the giving of Court's instructions numbered: 1 through 9, 9-A, 9-B, 10 through and including 24, 26, 27, 29 and

30. The Defendants both voiced objection to the giving of Court's instructions numbered 25 and 28.

The Plaintiff withdrew all of his tendered final instructions numbered 1 through and including 17. Defendants Hinshaw and General Surgeons, Inc., withdrew their tendered final instructions numbered 1 through 8 and 10 through and including 23. The Court determined and indicated that it would refuse and not read to the jury, Defendants Hinshaw and General Surgeons, Inc.'s tendered final instruction No.9.

Of Defendant Reid's tendered final instructions, Defendant Reid withdrew its tendered final instructions numbered 1 through 12 and 14 through and including 20. The Court determined and indicated that it would give and read to the jury Defendant Reid's tendered instruction No. 13 as Court's instruction 9-A and without objection.

The Defendants were given the opportunity to make a record regarding the Court's ruling upon their objections to the giving of Court's final instructions numbered 25 and 28. Their objections were stated on record in open court.

On December 18, 2000, the Plaintiff, Robert Daniel Hearn, appeared not. Attorneys Karen Neiswinger and Clyde Williams, appeared on behalf of the Plaintiff. Defendant, Michael A. Hinshaw, M.D., appeared in person. Defendant Hinshaw and Defendant General Surgeons, Inc., appeared by counsel, Mary Watts and Johnn (sic) Shubat, attorneys. Reid Hospital and Health Care Services, appeared by representative and counsel, L.A. Whaley, attorney.

Defendants Hinshaw and General Surgeons, Inc., concluded their case in chief and rested. Defendant Reid Hospital, presented its case in chief and rested. The Plaintiff presented the testimony of Robert Daniel Hearn.

By agreement of counsel, the Court, out of the statutorily prescribed order, read its final instructions to the jury and provided each juror with a copy of same. The Plaintiff, by counsel, gave his opening final argument to the jury. Defendants Michael A. Hinshaw, M.D. and General Surgeons, Inc., gave their closing argument to the jury. Defendant Reid Hospital and Health Care Services, gave its final argument to the jury. Plaintiff gave his closing final argument to the jury.

The Court orders that each of its final instructions and those tendered by the parties, be made a part of the record in this cause.

The Jury Bailiff, Sally Bardindale, is sworn in open court to perform her duties as such in this cause in the presence of the parties, their counsel and the jury and the jury now retires to the jury room to deliberate upon its verdict.

Plaintiff, Robert Daniel Hearn, appeared not. Attorneys Karen Neiswinger and Clyde Williams, appeared on behalf of the Plaintiff. Defendant, Michael A. Hinshaw, M.D., appeared in person. Defendant Hinshaw and Defendant General Surgeons, Inc. appeared by counsel, Mary Watts and John Shubat, attorneys. Reid Hospital and Health Care Services, appeared by representative and counsel, L.A. Whaley,

attorney and the jury appears in charge of the sworn Bailiff and returns in open court, the following verdict:

> "We, the jury, find for the Defendants, Michael A. Hinshaw, M.D., General Surgeons, Inc. And Reid Hospital & Health Care Services, and against Plaintiff, Robert Daniel Hearn."

The Court accepts and reads the verdict aloud in the presence of the parties, their counsel and the jury.

The Plaintiff, by counsel, polled the jury and each juror stated that the verdict returned was his or her individual verdict. The verdict was ordered filed and the jury was discharged.

The Court now enters Judgment upon the jury's verdict.

WHEREFORE, IT IS CONSIDERED, ORDERED, ADJUDGED AND DECREED that the Plaintiff, Robert Daniel Hearn, as husband and administrator of the Estate of Eva Mae H. Hearn, shall take nothing by way of his Complaint in this cause against the Defendants, Michael A. Hinshaw, M.D., General Surgeons, Inc., and Reid Hospital and Health Care Services. Judgment is entered in favor of the Defendant (sic) and against the Plaintiff. Costs vs. Plaintiff.

ALL OF WHICH IS CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court, this 18th day of December, 2000.

/S/ John L. Kellam
John L. Kellam, Judge

Henry Circuit Court

I hereby certify that a copy of the foregoing Order has been mailed or delivered to Karen B. Neiswinger, Clyde Williams, Mary H. Watts, Daniel T. Hackman, Johnn (sic) Shubat and L.A. Whaley, this 27th day of December, 2000.

/S/ Linda S. Ratliff
Clerk, Henry Circuit Court

Memorandum Decision of the Indiana Court of Appeals

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

KAREN B. NEISWINGER,
Indianapolis, Indiana

ATTORNEYS FOR APPELLEES:

NANA QUAY-SMITH
KARL L. MULVANEY
MARY H. WATTS
CANDACE L. SAGE
Bingham Summers Welsh & Spilman
Indianapolis, Indiana

FILED Dec 31 2001
Brian Bishop Clerk
of the Indiana
Supreme Court,
Court of Appeals
and Tax Court

L. ALAN WHALEY
ANDREA K. MARSH
Ice Miller
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ROBERT DANIEL HEARN, Husband and ADMINISTRATOR OF THE ESTATE OF EVA MAE H. HEARN, Deceased,

Appellant-Plaintiff,

vs. No. 89A04-0102-CV-71

MICHAEL A. HINSHAW, M.D, GENERAL SURGEONS, INC., and REID HOSPITAL & HEALTH CARE SERVICES,

Appellees-Defendants.

APPEAL FROM THE WAYNE SUPERIOR COURT
The Honorable John L. Kellam, Special Judge
Cause No. 89D01-9603-CT-012

December 31, 2001

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Chief Judge

Robert Daniel Hearn, as husband and as

administrator of the Estate of EvaMae H. Hearn ("Wife"), deceased (collectively "Estate"), appeals an adverse judgment in its wrongful death action against Michael A. Hinshaw, M.D., General Surgeons, Inc., and Reid Hospital & Health Care Services ("Reid Hospital"). The Estate raises three issues, which we restate as:

1. Whether the trial court abused its discretion by admitting testimony from two physicians regarding the alleged intrinsic weakness and microscopic structural abnormalities of Wife's hepatic artery;

2. Whether the trial court abused its discretion by refusing to admit Hinshaw's written submission to the medical review panel when pertinent portions of the same document had been read to the jury three times; and

3. Whether the trial court abused its discretion by moving an African-American prospective juror to the end of the queue because she arrived late for voir dire.

We affirm.

The facts most favorable to the judgment follow. On November 2, 1993, Wife had surgery to remove a portion of her colon which contained cancerous tissue. Hinshaw performed the surgery at Reid Hospital and was assisted by a licensed practical nurse, Frances Doner. Although the surgery appeared to be successful, Wife died suddenly two days after the

surgery. An autopsy was ordered, and the coroner determined that her cause of death was a ruptured aneurysm of her left hepatic artery.

The Estate filed a proposed complaint with the Indiana Commissioner of Insurance as required by the Medical Malpractice Statute, Ind. Code Sect. 34-18-8-1 to -8, alleging that the ruptured aneurysm was caused by trauma to the area from retractors used during the surgery. Following an adverse opinion by the medical review panel, this action for wrongful death was filed. The jury returned a verdict in favor of the defendants. The Estate filed a motion to correct errors, which the trial court denied.

I.

The first issue is whether the trial court abused its discretion by admitting testimony from two physicians regarding the alleged intrinsic weakness and microscopic structural abnormalities of Wife's hepatic artery. In a video-taped deposition shown at trial, defense expert witness Dr. Michael Dalsing, a Board Certified vascular surgeon, testified as follows regarding Wife's hepatic artery: "[T]here must have been some intrinsic problem that made the artery weaker than surrounding structures to be affected by the kind of trauma that seems to have been present during this case." Transcript at 533. The Estate argues that the trial court erred in admitting this testimony because it lacks a scientific foundation and is unreliable.

Before trial, the Estate filed a motion in limine asking the court to exclude Dr. Dalsing's testimony at

trial. The court denied the motion, and the Estate did not objection to Dr. Dalsing's testimony when it was offered at trial. A trial court's evidentiary determination on a motion in limine is preliminary. Clausen v. State, 622 N.E.2d 925, 927-28 (Ind. 1993), reh'g denied. A final determination on the admissibility of evidence is not made until the court can hear the evidence presented in context at trial. Id. At 928. Accordingly, failure to object to the admissibility of evidence at the time it is offered at trial results in waiver of the issue on appeal. Id. Here, because it failed to object to Dr. Dalsing's testimony when it was offered att rial, the Estate has waived appellate review of this issue.

In addition, defense witness Dr. George Nichols, a Board Certified forensic pathologist, whose deposition was read to the jury, testified as follows regarding the artery:

> It's my opinion, when I reviewed the microscopic slides of the hepatic artery, that there is clear evidence that the media, and also the intima, are not normal. (FN1) Present in the media are a series of spaces, if you would like, which are not stained but represent spaces which should not be present in this artery, especially in the media. There seems to be a corresponding abnormality also in the intima of the artery in which there is an angulation of the intraliminal (sic) surface which should not be present.

FN1 A blood vessel is composed of three layers (1) the intima, or inside layer, (2), the media, or smooth muscle layer, and (3) the adventitia, or the outer layer, Transcript at 42-43.

Transcript at 608-9. (Footnote added). The Estate argues that the trial court erred in admitting this testimony because it lacks scientific foundation and is unreliable.

Reversible error cannot be predicated upon a trial court's admission of evidence that is merely cumulative. Donaldson v. Indianapolis Pub. Transp. Corp., 632 N.E.2d 1167, 1172 (Ind.Ct.App., 1994). Here, our review of the record reveals that defense expert witness forensic pathologist Dr. Richard McClure also testified that he saw spaces or vacuoles in the hepatic artery. Dr. McClure further explained that he would not expect to see these spaces in a normal artery, and that they could weaken the wall of the artery to the point where the artery could rupture on its own. Dr. Nichols' testimony is merely cumulative of Dr. McClure's testimony, and reversible error cannot be predicated upon it.

Because the Estate did not object to Dr. Dalsing's testimony, and because Dr. Nichols' testimony was cumulative, the trial court did not abuse its discretion when it admitted the testimony of these two physicians.

II.

The next issue is whether the trial court abused its discretion by refusing to admit Hinshaw's submission to the medical review panel when pertinent portions of the same document had been read to the jury three times. A trial court's exclusion of evidence will generally be upheld if there is any basis upon which the ruling is correct. Wright v. State, 591 N.E.2d 1053, 1056 (Ind.Ct.App. 1992), trans. Denied. The

admission or exclusion of cumulative evidence is within the sound discretion of the trial court. Id. Typically, excluded cumulative evidence does not necessitate a new trial. Griffin v. State, 664 N.E.2d 373, 376 (Ind.Ct.App., 1996). "Erroneously excluded evidence requires reversal only if the error relates to a material matter or substantially affects the rights of the parties." Hite v. Haase, 729 N.E.2d 170, 178 (Ind.Ct.App. 2000).

During the testimony of Dr. Ted Gabrielsen, a member of the medical review panel, the Estate attempted to admit into evidence a document entitled "Defendant, Michael A. Hinshaw, M.D.'s Response to Plaintiff's Reply Submission Before the Medical Review Panel." Appellant's Appendix at 43. The submission at issue contains the following statement: "Dr. Hinshaw believes that the most probable explanation for this complication is a retractor injury; however, it is clear that it was a retractor injury as a result of safe usage of retractors in the standard fashion without unusual or excessive force." Appellant's Appendix at 53-55. Hinshaw's counsel objected, and the trial court sustained the objection. However, the statement was read aloud to the jury during the cross-examination of Dr. Gabrielsen, during Hinshaw's direct examination, and during Hinshaw's cross-examination.

The Estate argues that the document should have been admitted for three reasons: (1) the document was an item of evidence submitted to the medical review panel; (2) the document was admissible as a statement against interest under Ind. Evidence Rule 804(b)(3); and, (3) the document was admissible as extrinsic evidence of a prior inconsistent statement of a party opponent under Ind. Evidence Rule 613 (b). (FN

2). However, the only prejudice alleged by the Estate is that "the exhibit itself would have had more force and effect, as it was signed by Dr. Hinshaw's counsel, and would have been available to the jury when they deliberated, and thus, would have reinforced this evidence." Appellant's Brief at 26.

The Estate has not demonstrated that the exclusion of the rebuttal submission affected its case. See e.g., Hite, 729 N.E.2d at 180 (refusing to reverse the trial court's decision excluding evidence where the party failed to show that the exclusion of the cumulative evidence substantially affected her case). Moreover, because Hinshaw's statement in the document was read to the jury three times, admission of the actual document would have been merely cumulative of the testimony. Thus, the trial court did not abuse its discretion in excluding the document. See e.g., Wright, 591 N.E.2d at 1056 (holding that where testimony mirrored the contents of the letter, the letter was merely cumulative of the trial testimony)l

III.

The last issue is whether the trial court abused its discretion by moving an African-American prospective juror to the end of the queue because she arrived late for voir dire. Matters which relate to the orderly conduct of trial are generally within the trial

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FN2 In its Reply Brief, the Estate also argues that the submission was admissible under Ind. Evidence Rule 801(d)(2). However, because the Estate first raises this issue in its reply Brief, we will not address it. See, e.g., Hite, 729 N.E.2d at 183.

court's discretion. N. Ind. Pub. Serv. Co. v. G.V.K. Corp., 713 N.E.2d 842, 846 (Ind.Ct.App., 1999), reh'g denied, trans. denied. Moreover, a trial judge has control over the proceedings in his court, and his duty is to conduct business expeditiously and consistent with the orderly procedure and administration of justice. Id. At 847. We will review the trial court's decisions regarding the orderly conduct of a trial for an abuse of discretion. Id. An abuse of discretion occurs when the trial court's judgment is clearly against the logic and effect of the facts and inferences supporting the judgment for relief. Ford Motor Co. v. Ammerman, 705 N.E.2d 539, 558 (Ind.Ct.App. 1999), reh'g denied, trans. denied, cert. denied, 529 U.S. 1021, 120 S.Ct. 1424 (2000). In conducting such a review, however, we will not reweigh the evidence. Id.

A prospective juror, Ms. Ellen Mabry, arrived approximately thirty-five minutes late for voir dire. FN3. The trial court had already proceeded with its general voir dire examination. Rather than conduct an individual oath and voir dire for Mabry while the other jurors waited, the trial court moved Mabry to the end of the venire panel. The trial court indicated that "if Ms.

FN 3 The Estate argues that Mabry was only ten to fifteen minutes late rather than thirty-five minutes late as the trial court determined. Because we are mindful of our standard of review, we must decline the Estate's invitation to reweigh the evidence. Moreover, a determination of the exact amount of time that the juror was late is not essential to our determination of this issue.

Mabry was needed for jury selection, it would conduct a full individual voir dire with her at that time." Appellant's Appendix at 31. The Estate objected because both Hearn and Mabry are African-American and the resulting jury was "all white" FN 4 Appellant's Brief at 29.

The Estate first argues that the trial court's actions in placing Mabry at the end of the venire panel violated its Fourteenth Amendment right to equal protection of the laws. FN 5

FN 4 The Estate argues that the exclusion of Mabry resulted in an all-white pool of potential jurors. Reid Hospital counters by arguing, without support from the Record, that at least one other African-American was in the venire. The Estate replies by admitting that in "the initial pool of potential venire persons, there had been another African-American, who had been dismissed." Appellant's Reply Brief at 16. The Record does not reveal why the other African-American prospective juror was dismissed and the Estate does not appeal the dismissal of this juror. However, the Estate further argues that "the jury, in terms of jurors and alternatives, were, as a result of the elimination of Ellen Mabry, all-white" Id. We remind both the Estate and Reid Hospital that matters outside the record cannot be considered by the court on appeal. Zapffe v. Srbeny, 587 N.E.2d 177, 180 (Ind.Ct.App. 1992), reh'g denied, trans. denied. We must decide the case on the record before us and cannot speculate as to the actual facts of a case. Id. However, because the Estate has admitted that another African-American was in the venire, we assume this fact in our analysis.

FN 5 The Estate also argues that the trial court's actions denied the Estate its "constitutionally-protected right to have a member of [Hearn's] race serve on the jury panel." Appellant's Brief at 31. However, the United States Supreme Court noted in Batson that "a defendant has no right to a 'petit jury composed in whole or in part of persons of his own race.' ...But the defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." Batson v. Kentucky, 476 U.S. 79, 85-86, 106 S.Ct. 1712 (1986), modified by Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364 (1991). Thus, the Estate has no

constitutionally protected right to have a member of Hearn's race serve on the jury.

"Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." Batson v. Kentucky, 476 U.S. 79, 86, 106 S.Ct. 1712, 1717 (1986), modified by Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364 (1991); see also Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 628-629, 111 S.Ct. 2077, 2087 (1991) (applying Batson analysis to civil actions). To succeed under the Equal Protection Clause of the Fourteenth Amendment based on discrimination in jury selection, the burden is on the Estate "to prove the existence of purposeful discrimination." Batson, 476 U.S. at 93, 106 S.Ct. At 1721; see also Griffin v. State, 695 N.E.2d1010, 1014 (Ind.Ct.App., 1998).

For example, in the case of peremptory challenges, to establish a prima facie case of racial discrimination in the process of jury selection, a defendant must show that (1) the excused juror is a member of a cognizable racial group; (2) the prosecutor has exercised peremptory challenges to remove that group's members from the jury; and (3) the facts and circumstances of the case raise an inference that the exclusion was based on race. McCants v. State, 686 N.E.2d 1281, 1284 (Ind., 1997). Once the prima facie case is established, the burden shifts to the State to provide a race-neutral explanation for challenging such juror. Id. If the explanation, on its face, is based on something other than race, the explanation will be deemed race-neutral. Id.

Applying the same analysis to this case, the

Estate fails to demonstrate that the facts and circumstances of the case raise an inference that the placement of Mabry at the end of the venire panel was based on race. Rather, the trial court's placement of Mabry at the end of the venire panel was based upon her late arrival and the desire to conduct the voir dire in an expeditious and orderly manner.

In its Reply Brief, the Estate cites the recently decided case of Ashabraner v. Bowers in which the third prong of the Batson methodology was at issue. Ashabraner v. Bowers, 753 N.E.2d 662, 667 (Ind. 2001). Our supreme court noted that a prima facie case is established where a party removes the only African-American member of the venire. Id; see also Graham v. State, 738 N.E.2d 1096, 1100 (Ind.Ct.App. 2000) ("[W]hen there is only one African American potential juror who is struck by the State and the defendant is African American, such facts and circumstances alone raise the inference that the potential juror was struck by the State in an effort to prevent the potential juror from becoming part of the jury panel because of his or her race."), reh'g denied. However, the Estate admitted that Mabry was not the only African-American member of the venire. See supra note 4. The record does not indicate why the other African-American member of the venire was dismissed. Thus, we cannot determine whether Ashabraner is applicable.

However, assuming arguendo that the Estate established a prima facie case of racial discrimination, the trial court provided a race-neutral explanation for placing Mabry at the end of the venire panel. In fact, the Estate concedes that "it was the Court's concern for

convenience which had the effect of excluding the only remaining African-American venireman..." Appellant's Brief at 32 (emphasis added). Thus the Estate fails to meet its burden of demonstrating the purposeful discrimination required to violate the Fourteenth Amendment right to equal protection. See, e.g., Griffin, 695 N.E.2d at 1014 (holding that defendant failed to meet his burden of demonstrating purposeful discrimination where any error in the selection of the jury venire was due to a technical problem and, thus, was inadvertent). The trial court did not abuse its discretion. See e.g., Lyons v. State, 600 N.E.2d 560, 565 (Ind.Ct.App. 1992) (finding no abuse of discretion where the trial court dismissed a juror for cause after the juror had learned that certain evidence against the defendant was inadmissible), reh'g denied.

For the foregoing reasons, we affirm the trial court's judgment.

Affirmed

NAJAM, J. and RILEY, J. CONCUR

STATE OF INDIANA) IN THE HENRY CIRCUIT COURT
) SS: 2001 TERM
COUNTY OF HENRY) CAUSE NO. 33C01-9911-CT- 26

ROBERT DANIEL HEARN,	)	
As Husband and	)	
Administrator of the	)	
Estate of **EVAMAE H.**	)	
HEARN, Deceased,	)	
	)	Filed
Plaintiff,	)	Dec 22 2000

-vs-	)	Linda S. Ratliff
	)	Clerk Henry
MICHAEL A. HINSHAW, M.D.	)	Circuit Court
GENERAL SURGEONS, INC.,	)	
and **REID HOSPITAL &**	)	
HEALTH CARE SERVICES,	)	
	)	
Defendants.	)	

MOTION TO CORRECT ERRORS

Comes now Plaintiff, Robert Daniel Hearn, by counsel, pursuant to T.R. 50 of the Indiana Rules of Procedure, and respectfully moves the Court for the following alternative relief: 1) to enter Judgment in favor of Plaintiff notwithstanding the jury verdict or 2) to grant a new trial. In support of the relief requested, Plaintiff would respectfully show the Court as follows:

1. This case was tried to a jury, which rendered a verdict adverse to Plaintiff on December 18, 2000 after approximately 1 hour and 15 minutes of deliberation.

2. The jury's verdict is clearly erroneous, the product of errors, is against the weight of the evidence, and is an injustice to Plaintiff.

3. The following grounds are asserted as justifying the relief requested, in addition to such other grounds as the Court may determine justify vacating the jury's verdict, as the Court may grant relief under T.R. 50 upon its own motion and upon such grounds as it determines exist to justify vacating the jury's verdict:

a. The court's admission into evidence, over Plaintiff's objection via his motion to exclude, of speculative medical causation testimony from George Nichols, M.D., a pathologist, who testified that Plaintiff's decedent had an abnormal left hepatic artery that rendered the artery susceptible for minor manipulation. This testimony went directly to medical causation, was pure speculation, and was unsupported by virtually any scientific evidence, and most importantly, there is no evidence that any such alleged unusual susceptibility was present prior to the colon surgery. Dr. Nichols' testimony is premised upon the alleged existence of "vacuoles" containing an unknown and untested substance, which, despite the fact that it could not be identified, allegedly made the artery wall weak. Dr. Nichols was wholly unable to identify these alleged "vacuoles" in the walls of the uninvolved portion of the left hepatic artery, right hepatic artery, or anywhere else in the Decedent's body, and admitted that "maybe he wasn't smart enough" to look for such evidence. He even termed the question as to what these alleged abnormalities might be "a Ouija board question". Nichols deposition, p. 53. Furthermore, Drs. Hawley and McClure testified that these alleged "vacuoles" are nothing more than artifact caused by tissue processing, in which cells shrink as a result of being exposed to formaldehyde,

alcohol, heating and paraffin wax. Defendants' attempt to create a pre-existing problem which caused the artery to rupture has no basis in fact or science, and Dr. Nichols' testimony should have been excluded in its entirety, as requested in Plaintiffs' motion to exclude. The testimony from the discovery deposition of Dr. Nichols that was allowed into evidence at the trial went beyond disputing the microscopic appearance of the artery, and directly to the issue of medical causation. The exclusion of the phrases "degenerative disorder" and "microscopic metabolic deviation" did not change the fact that the speculative expert opinion testimony of Dr. Nichols went directly to medical causation and had absolutely no basis in science. Dr. Nichols' testimony should have been excluded in its entirety pursuant to Daubert.

b. The Court's admission into evidence, over Plaintiff's objection, of speculative medical causation testimony from Michael Dalsing, M.D., a vascular surgeon, who testified that Mrs. Hearn had "some intrinsic problem" with her left hepatic artery, making it structurally weaker than normal. As with the testimony of Dr. Nichols, the opinions of Dr. Dalsing are pure speculation paid expert testimony, going directly to medical causation, which are totally unsupported by any scientific evidence. Further, the Court's admission

of portions of Dr. Dalsing's videotaped deposition testimony is in contradiction to the Court's Order on Plaintiff's Motion To Exclude, in which the Court held the following in paragraph 21: "In generic terms, Defendants should be and are entitled to present medical opinions diametrically opposed to those provided by Plaintiff's experts. However, the separate and distinct opinions of Defendants' experts regarding causation of an alleged abnormal condition of the hepatic artery, be it from a proposed 'degenerative condition', or a proposed 'microscopic metabolic deviation', is not admissible and should be excluded." Dr. Dalsing's opinion testimony regarding the alleged structural weakness clearly went to medical causation, and should have been excluded, pursuant to the Court's Order on Plaintiff's Motion to Exclude.

c. The Court's redacting of portions of the official Coroner's Report (Verdict), striking the following highlighted language: "**It was speculated by Dr. Hinshaw at that time that during surgery, a retractor somehow damaged blood vessels which later ruptured completely, causing the hemorrhage, which caused her death.**" "This death is ruled accidental, **medical mis-hap.**" "Ruptured blood vessel **due to surgery error.**" These words and phrases were redacted even though Paul Patterson, the Wayne County Coroner, testified that Dr. Hinshaw stated during

the decedent's autopsy that Nurse Fran Doner must have pulled too hard on the retractor, causing the injury to the blood vessel. Mr. Patterson was portrayed as a liar by Defendants' counsel. Permitting the jury to view the full Coroner's Report, which was signed by Robert D. Beach, the Coroner of Wayne County at the time of the Decedent's death, would have lent credibility to Mr. Patterson's testimony. The redacting of the foregoing portions of the Coroner's Report was erroneous.

d. The Court's refusal to admit into evidence Exhibit 62, consisting of three pages which were submitted by Defendant Hinshaw as a rebuttal to Plaintiff's reply submission to the medical review panel. Said exhibit contained the following phrase: "Dr. Hinshaw believes that the most probable explanation for this complication is a retractor injury ... ." A copy of Exhibit 62 is attached hereto. This statement is in direct contradiction to Dr. Hinshaw's trial testimony, in which he testified that the cause of Mrs. Hearn's traumatic aneurysm was unknown, could not be ascertained, and certainly was not due to a retractor injury, because he never placed a retractor in the area of the left hepatic artery. Exhibit 62 is a prior inconsistent statement of a party opponent, which was signed by Dr. Hinshaw's counsel, and therefore attributable to him, and should have been

admitted into evidence under Indiana Evidence Rule 801 (d)(2).

e. The jury's verdict is clearly against the weight and sufficiency and the logic, force and effect of the evidence. There was no dispute in the trial that the applicable standard of care for both Dr. Hinshaw, the surgeon, and LPN Frances Doner was that reasonable care should be used to avoid causing traumatic injuries with a retractor. Defendant, Dr. Hinshaw admitted that this was the applicable standard of care, as did each of the members of the medical review panel, who were called to testify by the Defendants, as well as Plaintiff's expert surgeon, Ted Grisell, M.D.. Defendant, Dr. Hinshaw, admitted that the decedent incurred a traumatic aneurysm to her left hepatic artery. He also admitted that he did not dispute the opinion of Dr. Dean Hawley, a forensic pathologist at Indiana University Medical Center, who examined photographs of the decedent's liver and slides of the decedent's tissues after her death, and opined that she suffered a traumatic aneurysm of two days' duration, which placed the injury causing the aneurysm back to the time of the surgery. The only expert at trial who did not believe that the decedent incurred a traumatic aneurysm is Dr. Dalsing, who testified that he didn't know what happened to the artery, and that Dr.

Hawley also could not have known, because the artery wall, containing the unknown pathology, blew away during the rupture, and the parts were carried away by the blood leaking from the artery. This testimony about the wall being "blown away" was directly contradicted by Dr. McClure, a pathologist, another of Defendants' experts, who likened the ruptured artery wall to a punctured balloon, which is deflated, but still retains all parts present prior to the rupture.

Defendant Hinshaw also admitted, via his rebuttal submission, "that the most probable explanation for this complication is a retractor injury". (Exhibit 62). Defendant Reid admitted, via its submission to the medical review panel, that shearing force caused the aneurysm: "Any movement of the retractors would be in accordance with the surgeon's specific directions. The technician would therefore have initiated no action or movement that could have caused the shearing motion that apparently led to the development of the patient's aneurysm." Despite these admissions, the Defendants denied that a retractor was ever placed in the area where the aneurysm was found after death, and then called a series of expert witnesses to essentially dispute the truth of their own assertions, by creating a theory that the artery had "intrinsic

weakness". If a retractor had never been placed over or near the artery, then what is the relevance of any alleged "intrinsic weakness"? If the retractor never made contact with the artery, as Defendants claimed at trial, then the strength or weakness of the artery is irrelevant. Further, as shown supra, and in Plaintiff's Motion To Exclude and Motion in Limine, the expert testimony offered in an attempt to create a pre-existing structural weakness of the artery wall should have been excluded under Indiana Evidence Rule 702.

The evidence that Mrs. Hearn incurred a traumatic aneurysm, caused by shearing force applied to the wall of her hepatic artery during the colon surgery, and that this event occurred as a result of negligence, was overwhelming, and was established by the Defendants' own admissions. Defendants' expert evidence of an "intrinsic weakness" problem, presented to refute Dr. Hinshaw's own testimony and Reid's admission that there was "shearing force", was inadmissible, and obviously confused and prejudiced the jury, as it was designed to do. The jury's verdict is clearly against the weight, sufficiency, logic and force and effect of the evidence.

f. The Court removed from the queue one of only two potential African-American jurors

because she arrived a few minutes late and missed a portion of the Court's statement to the venire panel generally. Plaintiff's counsel entered a timely objection. Plaintiff and his decedent are African-American. The jury in this matter was all white. Potential jurors in this matter were seated according to their pre-assigned juror numbers, in numerical order. Ellen R. Mabry, an African-American, was assigned juror number 395. Because the Court removed Ms. Mabry from the queue, but did not excuse her, she went to the end of the queue and was replaced by Crescinda Leigh Elsrod, a Caucasian, who was assigned juror number 396. Ms. Elsrod was selected as a juror, and sat in the #1 position in the jury box. Therefore, because the Court removed Ms. Mabry from the queue, she could not be selected as a juror in this matter, which deprived Plaintiff of his 14th Amendment right to equal protection. See Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d69 (1986).

WHEREFORE, based upon the foregoing, and such other grounds as the Court may find that justifies the relief requested, Plaintiff, Robert Daniel Hearn, respectfully requests the Court for the following alternative relief: 1) to vacate the jury's verdict and render a Judgment in his favor; or 2) to vacate the jury's verdict and grant him a new trial.

Respectfully Submitted,

/S/

Karen B. Neiswinger, Attorney No.: 10154-49
Counsel For Plaintiff, Robert Daniel Hearn

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon the following counsel of record by depositing a copy of same in the United States Mail, first-class postage prepaid, this 22nd day of December, 2000, addressed as follows and via fax:

L. Alan Whaley
ICE MILLER DONADIO & RYAN
One American Square, Box 82001
Indianapolis, Indiana 46282-0002

Mary Hamilton Watts
John G. Shubat
BINGHAM SUMMERS WELSH & SPILMAN
10 West Market Street, Suite 2700
Indianapolis, Indiana 46204-2982

Clyde Williams, Jr.
WILLIAMS DELANEY & SIMKIN
P.O. Box 68
Richmond, IN 47375-0068

S/ Karen Neiswinger

Karen B. Neiswinger
Attorney At Law
6100 N. Keystone Avenue, Suite 235
P.O. Box 551099
Indianapolis, Indiana 46205-1099

Telephone: (317) 251-2250
Facsimile: (317) 251-2660

STATE OF INDIANA) IN THE HENRY CIRCUIT COU
) SS: 2001 TERM
COUNTY OF HENRY) CAUSE NO. 33C01-9911-CT-

ROBERT DANIEL HEARN, As Husband and Administrator of the Estate of **EVAMAE H. HEARN**, Deceased,	) Filed
Plaintiff,	) Jan 11 2001
-vs-	)Linda L. Ratliff)Clerk Henry Circ)Court
MICHAEL A. HINSHAW, M.D. GENERAL SURGEONS, INC., and **REID HOSPITAL & HEALTH CARE SERVICES**,	)
Defendants.	)

ORDER DENYING PLAINTIFF'S MOTION TO CORRECT ERRORS

Trial by jury in the above cause was conclud December 18, 2000. The jury returned a verdict in favor of all Defendants and against the Plaintiff upo the allegations of the Plaintiff's Complaint.

December 26, 2000, Plaintiff, by counsel, file his Motion to Correct Errors. December 28, 2000, t

Court granted to the Defendants a period of twenty (20) days in which to respond to Plaintiff's Motion To Correct Errors. The court now notes that the twenty (20) day period allotted, exceeds that permitted by TR 59 (E) which provides that the statement in opposition must be filed no later than fifteen (15) days after service of the motion. However, Defendants Michael A. Hinshaw, M.D. and General Surgeons, Inc. did file in a timely manner, a Statement in Opposition to Plaintiff's Motion to Correct Error on January 9, 2001.

The Court having read and reviewed the Plaintiff's Motion to Correct Errors and Defendants Hinshaw and General Surgeons, Inc.'s Statement in Opposition determines that the issues addressed were raised, argued and litigated extensively both during the trial and pre-trial of this cause. The court attempted to carefully consider and weigh the respective positions of the parties at the time the issues were originally raised and determined. It therefore, respectfully denies Plaintiff's Motion to Correct Errors in its entirety.

Ordered this 11TH day of January, 2001.

/S/ John L. Kellam, Judge
Judge, Henry Circuit Court

Distribution:

Mary H. Watts
John G. Shubat
2700 Market Tower
10 West Market Street
Indianapolis, IN 46204-2982

Karen Neiswinger
6100 North Keystone Avenue
Suite 235
P.O. Box 551099
Indianapolis, IN 46205-1099

L. Alan Whaley
Once (sic) American Square
Box 82001
Indianapolis, IN 46282-002 (sic)

STATE OF INDIANA)	IN THE WAYNE SUPERI
)	COURT
) SS:	
COUNTY OF WAYNE)	CAUSE NO.: 89I
	9603-CT-012
ROBERT DANIEL HEARN,	)
As Husband and	)
Administrator of the	)
Estate of **EVAMAE H. HEARN**, Deceased,	) Filed
	)Feb 9, 2001
	)Wayne Superior
	)Court
Plaintiff,	) Sue Ann Lower
	)Clerk of Courts
-vs-	)
	)
MICHAEL A. HINSHAW, M.D.	)
GENERAL SURGEONS, INC.,	)
and **REID HOSPITAL & HEALTH CARE SERVICES**,	)
	)
	)
Defendants.	)

NOTICE OF APPEAL

Robert Daniel Hearn, Administrator of the Estate of EvaMae H. Hearn, Deceased, by counsel, pursuant to Indiana Appellate Rule 9 (A), respectfully gives notice of an appeal from the final judgment entered in the Wayne Superior Court I, dated December 18, 2000 and the Order denying Plaintiff's Motion To Correct Errors, dated January 11, 2001. This appeal will be taken to the Indiana Court of Appeals.

The Clerk of Wayne County is requested to assemble, in chronological order, all papers filed, or offered for filing, in this action.

The official court reporter of Wayne Superior Court I is requested to transcribe, certify, and file with the Clerk of Wayne Superior Court I the trial testimony of the following witnesses, along with exhibits offered, and/or admitted into evidence during the testimony of each such witness, including proposed Exhibit 62, that was not admitted into evidence:

Dean A. Hawley, M.D.
Ted Grisell, M.D.
Paul Patterson
Ted H. Gabrielsen, M.D.
Thomas Miller, M.D.
Mark A. Edwards, M.D.
Michael Dalsing, M.D.
George Nichols, M.D.
Richard McClure, M.D.
Michael Hinshaw, M.D. (testified twice)
Fran Doner, L.P.N.

The official court reporter of Wayne Superior Court I is further requested to prepare a transcript of

all oral argument and the Court's ruling on proposed Exhibit 62, all oral argument and the Court's ruling redacting portions of the Wayne County Coroner's Report, and the transcript of all oral argument and the Court's ruling placing potential juror, Ellen R. Mabrey, at the end of the queue of potential jurors.

Respectfully Submitted,

/S/

Karen B. Neiswinger, Attorney No.10154-49
Counsel For Plaintiff, Robert Daniel Hearn

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following by depositing a copy of same in the United States Mail, first-class postage prepaid, this 9th day of February, 2001, addressed as follows:

L. Alan Whaley
ICE MILLER DONADIO & RYAN
One American Square, Box 82001
Indianapolis, Indiana 46282-0002

Mary Hamilton Watts
John G. Shubat
BINGHAM SUMMERS WELSH & SPILMAN
10 West Market Street, Suite 2700
Indianapolis, Indiana 46204-2982

Clyde Williams, Jr.
WILLIAMS DELANEY & SIMKIN

P.O. Box 68
Richmond, IN 47375-0068

Sue Anne Lower, Clerk of Courts
Wayne County Courthouse
301 East Main Street
Richmond, Indiana 47374
Certified Mail Number: Z 477 753 693

Brian Bishop, Clerk
Indiana Court of Appeals and Supreme Court
200 West Washington Street, #217
Indianapolis, IN 46204
Certified Mail Number Z 477 753 703

/S/ Karen Neiswinger

Karen B. Neiswinger
Attorney At Law
6100 N. Keystone Avenue, Suite 235
P.O. Box 551099
Indianapolis, Indiana 46205-1099
Telephone: (317) 251-2250
Facsimile: (317) 251-2660

STATE OF INDIANA	) IN THE HENRY CIRCUIT
	) COURT
	)SS:
COUNTY OF WAYNE	) CAUSE NO.: 33C01-
	) 9911- CT-026
ROBERT DANIEL HEARN,	)
	)

As Husband and Administrator of the Estate of **EVAMAE H. HEARN**, Deceased,	) Filed Feb 10 2001) Linda S. Ratliff)Clerk Henry Circuit)Court
Plaintiff,	)
-vs-	)
MICHAEL A. HINSHAW, M.D. GENERAL SURGEONS, INC., and **REID HOSPITAL & HEALTH CARE SERVICES,**	)
Defendants.	)

NOTICE OF APPEAL

Robert Daniel Hearn, Administrator of the Estate of EvaMae H. Hearn, Deceased, by counsel, pursuant to Indiana Appellate Rule 9 (A), respectfully gives notice of an appeal from the final judgment entered in the Wayne Superior Court I, dated December 18, 2000 and the Order denying Plaintiff's Motion To Correct Errors, dated January 11, 2001 in which the Honorable John L. Kellam served as Special Judge for Wayne Superior Court I. This appeal will be taken to the Indiana Court of Appeals.

The Clerk is requested to assemble, in chronological order, all papers filed, or offered for filing, in this action, along with the chronological case summary.

Respectfully Submitted,

/S/

Karen Neiswinger, Atty. No.: 10154-49
Counsel For Plaintiff, Robert Daniel Hearn

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon the following counsel of record by depositing a copy of same in the United States Mail, first-class postage prepaid, this 10 day of February, 2001, addressed as follows:

L. Alan Whaley
ICE MILLER DONADIO & RYAN
One American Square, Box 82001
Indianapolis, Indiana 46282-0002

Mary Hamilton Watts
John G. Shubat
BINGHAM SUMMERS WELSH & SPILMAN
10 West Market Street, Suite 2700
Indianapolis, Indiana 46204-2982

Clyde Williams, Jr.
WILLIAMS DELANEY & SIMKIN
P.O. Box 68
Richmond, IN 47375-0068

Linda S. Ratliff, Clerk
Henry Circuit & Superior Court
101 S. Main Street

P.O. Box B
New Castle, IN 47362
Certified Mail Number: 7000 0520 0015 4862 9232

/S/ Karen Neiswinger
Karen B. Neiswinger
Attorney At Law
6100 N. Keystone Avenue, Suite 235
P.O. Box 551099
Indianapolis, Indiana 46205-1099
Telephone: (317) 251-2250
Facsimile: (317) 251-2660

EXCERPT FROM pp. 27-32 of PETITIONER'S BRIEF TO THE INDIANA COURT OF APPEALS AS IT RELATES TO THE ISSUES BEFORE THIS COURT

IN THE INDIANA COURT OF APPEALS
CAUSE NO.: 89A04-0102-CV-71

Robert Daniel Hearn,
Husband and Administrator of the
Estate of EvaMae H. Hearn, Deceased,
Appellant, Plaintiff Below,

-vs-

MICHAEL A. HINSHAW, M.D.,
GENERAL SURGEONS, INC., and
REID HOSPITAL & HEALTH CARE
Appellees, Defendants Below.

Filed
June 11, 2001
Brian Bishop,
Indiana
Clerk of Courts

Appeal From the Wayne Superior Court
The Honorable John L. Kellam, Special Judge

Cause No. 89D01-9603-CT-012

BRIEF OF APPELLANT,
ROBERT DANIEL HEARN.

Karen B. Neiswinger, Attorney ID#: 10154-49
Attorney At Law
6100 North Keystone Avenue, Suite #235
P.O. Box 551099
Indianapolis, Indiana 46205-1099
Telephone: (317) 251-2250
Fax: (317) 251-2660

Attorney For Appellant, Robert Daniel Hearn, Husband and Administrator of the Estate of EvaMae H. Hearn, Deceased

* * *

p. 27

C. The trial court erred when it removed the only remaining African-American potential juror from the queue and replaced her with a Caucasian venireman, who was selected as a juror.

During the Court's general *voir dire* examination of the jury, potential juror Ellen R. Mabry arrived late, and did not receive the venire panel's oath. After arriving somewhat late, Ms. Mabry sat in the back of the courtroom for a period of time, and eventually, it was brought to the trial court's attention that she was a potential juror. At this point, the trial judge advised Ms. Mabry to wait outside the courtroom, and "let me ask you if you could just stand by for us and if you're

needed, why, we'll get to you, if not, maybe then you won't have to serve." (Appellant's App., p. 253; quotation, p.253: 19-21; Tr. p. 29). Appellant's counsel immediately approached the bench and objected on the basis that Ms. Mabry was the only African-American potential juror, and that Crescinda Elsrod, who came after Ms. Mabry in the queue, was placed ahead of Ms. Mabry, who was moved to the last position in the queue. The Transcript records the following comments of the trial judge: "I excused - she was moved to the end of the panel. I've excused everything - everybody from the first eight on, which included her, so - in other words, I indicated to you I was not willing to bring her in and go through everything we had to go through with all the other jurors so that she would be a part of the panel." (Appellant's App., p. 254: 8-13; Tr. p. 30). Ms. Mabry was passed over in selection of the regular jury and for the alternate.

Appellant's counsel entered timely objections at both stages of *voir dire*, on the grounds that Appellant, as an African-American, had the right, under the Sixth and Fourteenth Amendments, to equal protection and due process, which included being afforded the opportunity to have a member of his race serve as jurors. Placing Ms. Mabry at the end of the queue resulted in an all-white pool of potential jurors. (Appellant's App., pp. 253-259; Transcript, pp. 30-34).

In the Order Regarding Trial By Jury and Judgment, the trial court indicated that prospective juror #3395, Ellen Rochelle Mabry, "...appeared late for jury selection. Ms. Mabry entered the courtroom after the Court had commenced its general voir dire examination of jurors. The Court estimated that it had

questioned prospective jurors for approximately 35 minutes at the time Ms. Mabry entered the courtroom. At the conclusion of the Court's questioning of prospective jurors, the Court informed the Bailiff that Ms. Mabry should wait until the jury was selected. However, the Court indicated to the Bailiff that it would not swear Ms. Mabry and conduct an individual approximate 35 minute inquiry with her, while the other jurors waited. The Court determined that if Ms. Mabry was needed for jury selection, it would conduct a full individual voir dire with her at that time. A jury was selected. At the time Kevin Land was excused for cause, the Court replaced Mr. Land with Crescinda Elsrod. At that time, Plaintiff's counsel objected that prospective juror Land should have been replaced with prospective juror Mabry. The Court declined to do that. Plaintiff argues that Juror Mabry, an African American, is of the same race as the Plaintiff, Robert Daniel Hearn, and that the Court's refusal to accommodate Ms. Mabry by conducting an individual voir dire examination when she appeared late for jury selection, served to violate the Plaintiff's right to due process. The Court proceeded with jury selection. Ultimately, the services of Ms. Mabry were not required and she was discharged along with five other prospective jurors." (Appellant's App., p.31).

In Appellant's motion to correct errors (Appellant's App., pp. 44-55, see pp. 50-51), Appellant pointed out that Ms. Mabry was assigned juror number 395. The potential veniremen were seated according to their juror numbers. Ms. Crescinda Leigh Elsrod, a Caucasian, was assigned juror number 396, and because Ms. Mabry had been bumped from the queue, Ms. Elsrod replaced Mr. Land, and eventually was

seated as a juror instead of Ms. Mabry. However, if Ms. Mabry had not taken out of the queue, and if Ms. Mabry and Ms. Elsrod had been taken in their assigned numerical order, as had been the case with all of the other jurors, Ms. Mabry would have been seated to replace Mr. Land, rather than Ms. Elsrod. As stated above, Appellant, Robert Daniel Hearn and Ms. Mabry, are both African-American, and Appellant did enter a timely objection to Ms. Mabry being placed at the end of the queue and taken out of order. The jury in this case was all-white.

In the case of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the United States Supreme Court affirmed that principle that the State denies a black person equal protection when it puts him on trial before a jury from which members of his race have been purposefully excluded, citing Strauder v. West Virginia, 100 U.S. 303 (1880).The Strauder case has served as the foundation for several subsequent landmark cases affecting the procedures used to select the venire from which individuals are drawn. And while the issue in this case is not whether African-Americans were globally excluded from the pool of potential venire members, the reasoning is directly applicable here.

Ms. Mabry was not technically excused, but taken out of the pre-assigned order of veniremen, which, as the trial court acknowledged, had the practical effect of eliminating her as a juror, as if she had never been summoned for jury duty at all, because the only way she would be permitted to serve is if each and every one of the remaining white veniremen had been eliminated. The trial Judge's statement

establishes that the Court was aware that it was not likely that Ms. Mabry would serve--on p. 30 of the Transcript, the Judge states: "I excused -- she was moved to the end of the panel. I've excused everything - everybody from the first eight on, which included her, ..." (Appellant's App, p. 254: 8-9; Tr. p. 30). Further, the Court's Order clearly implies that the Court recognized that bumping Ms. Mabry from the queue would likely result in her not serving as a juror: "However, the Court indicated to the Bailiff that it would not swear Ms. Mabry and conduct an individual approximate 35 minute inquiry with her, while other jurors waited. The Court determined that if Ms. Mabry was needed for jury selection, it would conduct a full individual voir dire with her at that time." (Appellant's App., p. 31).

It should be noted here that Ms. Mabry was late, but one reason that she missed so much of the trial court's *voir dire* examination is that she sat at the rear of the courtroom for a period of time before being brought to the Judge's attention: "The question was why Ms. Elsrod was put into the jury box to replace, I think, it was Mr. Steele, who, at that time was excused and not Ms. Mabrey. Ms. Mabrey was not here when we started voir dire examination, was not sworn with the other jurors and a portion, at least, of the Court's voir dire examination had already occurred at the time she entered the courtroom. Then, it was sometime before I was told who she was. I saw an individual enter, but I really didn't know who that person was. So when I was asked do we replace juror Steele with juror Elsrod (sic), my response was no. To do that, we would have had to stop all proceedings, go back, deal with juror Elsrod (sic) individually to get her up to the point

where all the other jurors were in order to accomplish that. Since we're dealing with this many people's lives in selecting a jury, I elected not to do that." (Appellant's App., p. 254,: 23-26; p. 255: 1-11; Tr. pp. 30, 31).

Thus, the sole grounds for the Court's bumping of Ms. Mabry was that it would inconvenience the Court and other potential jurors for the Court to repeat a portion of its preliminary *voir dire* examination for Ms. Mabry. However, as the Court's Order states, if the other potential jury panel members had been excused for cause or otherwise, the Court would have proceeded with conducting a preliminary *voir dire* examination of Ms. Mabry. Therefore, if there were no other persons available to serve on the jury, then the alleged inconvenience of repeating the preliminary *voir dire* would be acceptable. Thus, the inconvenience of conducting Ms. Mabry's individual *voir dire* was not, *per se*, unacceptable; it was only relatively unacceptable--that is, if there were no other potential jurors available to serve.

The Sixth Amendment to the U.S. Constitution guarantees the right to a jury drawn from a cross section of the community. Batson, supra. The Fourteenth Amendment to the U.S. Constitution guarantees equal protection of the laws. *Id.* A State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause. Swain v. Alabama, 380 U.S. 202 (1965) at 203-204. Trial courts have discretionary authority to excuse prospective jurors, but such discretion must not be exercised illogically or arbitrarily. Holt v. State, (1977)

266 Ind. 596, 365 N.E.2d 1209. Appellant submits that the trial court's refusal to undergo the relative inconvenience of quickly going through the trial court's preliminary questions, which would not have taken as long with one juror as it did with the entire panel, is an illogical and arbitrary grounds for denying Plaintiff his constitutionally- protected right to have a member of his race serve on the jury panel, as well as Ms. Mabry's constitutionally-protected right to participate as a citizen by serving as a juror. Ms. Mabry, while late, did not attempt to avoid her service or ask to be excused.

This case is somewhat unique in that most of the cases dealing with the issue of elimination of minorities from jury service involve the State or a party acting via peremptory challenges. In this case, however, it was the trial court that eliminated Ms. Mabry from consideration, solely on the grounds of inconvenience. Appellant has not found a case directly on point with the facts of this case. In the case when an African-American juror is eliminated because of exercise of a peremptory challenge, the standard for establishing a prima facie case of racial discrimination is: 1) the excused juror is a member of a cognizable racial group; 2) the prosecutor has exercised peremptory challenges to remove that group's members from the jury; 3) the facts and circumstances of the case raise an inference that the exclusion was based on race. McCants v. State, 686 N.E.2d 1281 (Ind., 1997). In Graham v. State, 738 N.E.2d 1096 (Ind.Ct.App., 2000), the Court of Appeals acknowledged that when there is only one African American potential juror who is struck by the State and the defendant is African American, such facts and circumstances alone raise the inference that the

potential juror was struck by the State in an effort to prevent the potential juror from becoming part of the jury panel because of his or her race. *Id*, at p. 1100, citing McCants v. State, 686 N.E.2d 1281 (Ind., 1997).

The Equal Protection Clause guarantees that the State will not exclude members of a litigant's race from the jury venire on account of race. Here, since it was the Court's concern for convenience which had the effect of excluding the only remaining African-American venireman, and a timely challenge was raised, Appellant submits that the trial court abused its discretion in eliminating Ms. Mabry from practical consideration as a juror by bumping her from the pre-assigned order of potential jurors.

Excerpt from pp. 12-18 if Petitioner's Reply Brief to the Indiana Court of Appeals

IN THE INDIANA COURT OF APPEALS
CAUSE NO.: 89A04-0102-CV-71

Robert Daniel Hearn,
Husband and Administrator of the
Estate of EvaMae H. Hearn, Deceased,
Appellant, Plaintiff Below,

-vs-

MICHAEL A. HINSHAW, M.D.,
GENERAL SURGEONS, INC., and
REID HOSPITAL & HEALTH CARE
Appellees, Defendants Below.

Filed
Oct 4, 2001
Brian Bishop,
Indiana
Clerk of Courts

Appeal From the Wayne Superior Court
The Honorable John L. Kellam, Special Judge
Cause No. 89D01-9603-CT-012

**REPLY BRIEF OF APPELLANT,
ROBERT DANIEL HEARN.**

Karen B. Neiswinger, Attorney ID#: 10154-49
Attorney At Law
6100 North Keystone Avenue, Suite #235
P.O. Box 551099
Indianapolis, Indiana 46205-1099
Telephone: (317) 251-2250
Fax: (317) 251-2660

Attorney For Appellant, Robert Daniel Hearn,
Husband and Administrator of the Estate of
Eva Mae H. Hearn, Deceased.

* * *

p. 12:

C. The trial court erred when it removed Ellen Mabry, the only African-American venireperson, and replaced her with a Caucasian, who was selected as a juror.

1. Venireperson Mabry was <u>not</u> 35 minutes late in <u>reporting</u> for jury duty.

In their briefs, Appellees argue that Ellen Mabry, the only African-American venireperson, was 35 minutes late in appearing for jury duty, and therefore, it was not an abuse of discretion for the trial court to remove her from the pre-assigned order of potential jurors and to replace her with a Caucasian, who

ultimately served as a juror. (Hinshaw, et al. brief, pp. 30, 31, 32; Reid brief, pp. 18, 20). Defendant Reid Hospital claims that Ms. Mabry "missed voir dire" (Reid brief, p. 18); however, the record establishes that she missed only a portion of voir dire. *See* p. 253 of Appellant's Appendix, line 22 --"voir dire continues", which appears after the colloquy wherein the trial court discovered that Ms. Mabry was present in the courtroom. See also Appellant's App., p. 255, lines 1-3.

Notwithstanding the Appellees' arguments, the record establishes that Ms. Mabry was actually only about 10 to 15 minutes late in reporting for jury duty. She apparently entered the courtroom after the trial court had begun *voir dire* examination, and was seated at the back of the courtroom. The record reflects that the trial judge noticed her arrival, but ignored her. No one took any steps to determine whether she was a potential juror until after about thirty five minutes into the court's *voir dire* examination, which was after she had sat at the back of the courtroom for about 20 minutes:

> THE COURT: Okay. The question was why Ms. Elsrod was put into the jury box to replace, I think, it was Mr. Steele, who, at that time was excused and not Ms. Mabry. Ms. Mabrey was not here when we started voir dire examination, was not sworn with the other jurors and a portion, at least, of the Court's voir dire examination had already occurred at the time she entered the courtroom. Then it was sometime before I was told who she was. I saw an individual enter, but I really didn't know who

that person was. So when I was asked do we replace juror Steele with juror Elsrod (sic, should be "Mabry"), my response was no. to do that, we would have had to stop all proceedings, go back, deal with juror Elsrod (sic) individually to get her up to the point where all the other jurors were in order to accomplish that. Since we're dealing with this many people's lives in selecting a jury, I elected not to do that. So, not whether you agree with my decision there or not, but is that a fair statement of what occurred during that bench conference?

MS. NEISWINGER: We agree - we agree that Ms. Mabrey was over - was passed over, but she was not dismissed from these proceedings. Our objection is on the grounds that Ms. Mabrey is an African-American, my client is an African-American and the equal protection and due process clauses of the United States Constitution give him the right to have a jury that is fairly selected and to the maximum extent possible, representative of the community. She was present, we didn't believe that she missed that much of the Court's voir dire that she could be brought up to speed rather quickly. She was passed over both in terms of replacing Mr. Steele, who was the employee of one of the defendants here, and also was passed up for the purposes of sitting as an alternate juror. And it is our contention that it would not have taken that much time to have asked her the voir dire questions and she only missed approximately, we - in my estimation ten minutes or so of what the Court's questions were.

* * *

MR. SHUBAT (representing Defendants Hinshaw and General Surgeons, Inc.): Judge, I would just like to put on the record that my - I wrote down that you started questioning the jurors at 1:20 and based upon her statement that she was here for 20 minutes or so, that means she would have had to miss about 35 minutes rather than the ten at least by my estimation.

(Appellant's App., p. 254: 23-26; p. 255: 1-26 p. 256: 1-5; 257: 20-25).

Therefore, according to the above colloquy, Ellen Mabry was actually only 10 to 15 minutes late in reporting for jury duty, but because she was essentially ignored for about another 20 minutes, the trial court determined that she was 35 minutes late and moved her to the end of the queue, finding that it was too much trouble to conduct an individual *voir dire* examination of her until or unless the remaining panel of Caucasian jurors were not selected. A correct factual foundation is important to this Court's determination of the constitutional issues raised herein, because this Court's ruling in this case could well affect the due process and equal protection rights of minorities arriving late for jury duty. It is noteworthy that most of the potential delay that would have been encountered in bringing Juror Mabry up to speed was due to the fact that no one asked her if she had been summoned for jury duty until about 20 minutes after the trial judge observed her enter the courtroom. It is also noteworthy that no attempt was made by the trial court to determine whether Ms. Mabry had a valid reason or

excuse for her tardiness--she could well have been late due to no fault of her own. The sole grounds cited by the trial court for bumping her from practical consideration as a juror was the fact that it would be simply too inconvenient to delay the proceedings in order to ask Ms. Mabry the questions that had already been asked of the venire persons already present. As Appellant's counsel pointed out to the trial court, it would not have taken as long to question one potential juror than the entire panel that had been summoned. (Appellant's App., pp. 255, 258).

2. The trial court knew when it excused Ms. Mabry from her pre-assigned order of prospective jurors that this action would likely mean that she would not serve.

The record establishes that the trial court was well aware that removing Ms. Mabry from her pre-assigned juror spot would most likely mean that she would not have an opportunity to serve as a juror:

> THE COURT: I take it, ma'am, you've not been here for all my questions then.
>
> JUROR MABREY: (Inaudible).
>
> THE COURT: Okay. Let me ask you if you could just sort of stand by for us and if you're needed, why, we'll get to you, if not, maybe then you won't have to serve.
>
> * * *
>
> MS. NEISWINGER: Well, is she eliminated? Ms. Mabrey?
>
> THE COURT: I excused - she was moved

to the end of the panel. I've excused everything - everybody from the first eight on, which included her, so - in other words, I indicated to you I was not willing to bring her in and go through everything we had to go through with all the other jurors so that she would be a part of the panel.

(Appellant's App., p. 253: 16-21; p. 254: 4-13).

The above colloquy establishes that the trial court, from its perspective, felt it had excused Ms. Mabry, subject to allowing her to serve only if none of the remaining Caucasian jurors could serve.

3. Ellen Mabry was the only remaining African-American venireperson.

On p. 20 of its brief, Appellee Reid Hospital claims that the statement that Ms. Mabry was the only African-American potential juror is "both inaccurate and unsupported by the record", citing pp. 253-259 of Appellant's Appendix. There is nothing on these pages of Appellant's Appendix which supports Reid Hospital's claim that any of the remaining venire persons were African American. In fact, on p. 256 of Appellant's Appendix, lines 8-10, the record reflects that the jury, in terms of the jurors and alternates, were, as a result of the elimination of Ellen Mabry, all-white. In the initial pool of potential venire persons, there had been another African American, who had been dismissed; however, this is irrelevant to the issues surrounding the trial court's dismissal of Ellen Mabry.

4. The recently-decided *Ashabraner* case held that jury selection is subject to federal

constitutional analysis even if the state is not a party.

Defendants Hinshaw and General Surgeons argue that *Batson* is inapplicable because the trial court, and not a party, removed Ms. Mabry. The Indiana Supreme Court in the case of Ashabraner v. Bowers, 753 N.E.2d 662 (Ind., 2001), decided August 30, 2001, affirmed the principle that the case of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) applies to civil as well as criminal cases, and that removal of black persons from the jury panel also violates the juror's constitutional rights. *See* Powers v. Ohio, 499 U.S. 400 (1991) and Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), in which the United States Supreme Court held that a trial court is so intertwined with jury selection that its imprimatur is placed on any peremptory challenges that it allows. "This interconnection makes racially-based peremptory challenges a form of state action susceptible to federal constitutional analysis even if the state is not a party to the litigation. *See, e.g., id.* ("As we have outlined here, a private party could not exercise its peremptory challenges absent the overt, significant assistance of the court."). Ashabraner, supra, at p. 666 of 753 N.E.2d. As the Ashabraner Court noted:

> Three factors must be established before a party makes out a prima facie case under *Batson*. The first two--that the juror was a member of a cognizable group and that the party removed jurors of this group--are not at issue. The heart of Ashabraner's *Batson* claim is the third factor--whether "the facts and circumstances of the defendant's case raise an inference that [a party]

used [challenges] to exclude venire persons from the jury due to their race." *Bradley v. State*, 649 N.E.2d 100, 105 (Ind., 1995) *reh'g denied.* The record shows that Bowers removed the only black member of the venire. We have held that this fact alone establishes a prima facie case, *see McCants v. State*, 686 NE.2d 1281, 1284 (Ind., 1997), and, at a minimum, it is evidence of discrimination that must weigh in the balance.

Ashabraner, supra, at p. 667 of 753 N.E.2d.

Therefore, in this case, although it was not a party, but rather the trial court itself, which removed the only black venireperson, the fundamental analysis is no different, since state action is involved regardless of who removes the black venireperson. The removal of the only black venireperson establishes a prima facie inference of discrimination. As the Indiana Supreme Court held, this factor must weigh in the balance.

Excerpt from pp. 11-14 of Petitioner's Petition For Rehearing to the Indiana Court of Appeals

IN THE INDIANA COURT OF APPEALS
CAUSE NO.: 89A04-0102-CV-71

Robert Daniel Hearn,
Husband and Administrator of the Estate of EvaMae H. Hearn, Deceased,
Appellant, Plaintiff Below,

-vs-

Filed
Jan 30, 2002
Brian Bishop,
Clerk Supreme Court, Court of Appeals and Tax

MICHAEL A. HINSHAW, M.D., GENERAL SURGEONS, INC., and REID HOSPITAL & HEALTH CARE
Appellees, Defendants Below.

Court

Appeal From the Wayne Superior Court
The Honorable John L. Kellam, Special Judge
Cause No. 89D01-9603-CT-012

PETITION FOR REHEARING OF APPELLANT, ROBERT DANIEL HEARN.

Karen B. Neiswinger, Attorney ID#: 10154-49
Attorney At Law
6100 North Keystone Avenue, Suite #235
P.O. Box 551099
Indianapolis, Indiana 46205-1099
Telephone: (317) 251-2250
Fax: (317) 251-2660

Attorney For Appellant, Robert Daniel Hearn,
Husband and Administrator of the Estate of
Eva Mae H. Hearn, Deceased.

* * *

p. 11:

D. The Slight Delay That Resulted From The Late Arrival of Juror Mabry Is Not a Sufficient Ground To Deny Appellant's Constitutionally-Protected Rights To Equal Protection and Due Process.

Prospective Juror, Ellen Mabry, an African-American, arrived late for jury duty. Exactly how late

is disputed, as this Court noted, Appellant contends that she was 10-15 minutes late, and the trial court stated it was 35 minutes. (Memorandum Opinion, p. 7-8 footnote beginning on p. 7). In his reply brief, Appellant has demonstrated that the Record reflects that although Ms. Mabry arrived late, and her arrival was noticed by the trial judge, she missed about 35 minutes of general *voir dire* because she sat at the back of the courtroom, without being brought into the jury box with the Caucasian jurors. (See Appellant's Reply Brief, pp. 13-15, and citations therein). This is not the same as arriving 35 minutes late. The Memorandum Opinion states that the exact amount of time she was late is not essential to this Court's determination of this issue, because the trial judge has a duty to conduct business expeditiously, consistent with the orderly procedure and administration of justice, and that trial court decisions regarding the orderly conduct of a trial are reviewable for an abuse of discretion. (Memorandum Opinion, p. 7).

The Memorandum Opinion also notes that the recent Indiana Supreme Court opinion of Ashabraner v. Bowers, 753 N.E.2d 662, 667 (Ind., 2001) held that an inference of racial discrimination is established where only one African-American potential juror is struck by the State and a defendant is African-American. The Memorandum Opinion then states that this Court cannot determine if Ashabraner is applicable because there had been another African-American potential juror who was dismissed. The Record does not reflect the presence of any other African-American potential jurors, as Appellant's counsel recalls that the other African-American juror was released prior to *voir dire* because of personal hardship. Therefore, this juror

was never in play for possible service in this case. Further, at trial, Appellants did not raise the matter of the juror dismissed prior to *voir dire* when Appellant objected to placing Ms. Mabry at the end of the queue.

There is no dispute, however, that at the time *voir dire* was conducted and Ellen Mabry was placed at the end of the queue, she was the only African-American potential juror, and Appellant raised timely and proper constitutional objections. (Appellant's App., p. 254: 23-26; p. 255: 1-26; p. 256: 1-5; 257: 20-25). Therefore, Ashabraner is applicable. However, the Memorandum Opinion held that even if Ashabraner is applicable, there was a race-neutral explanation for placing Ellen Mabry–i.e., she was late; therefore, Appellant failed to meet his burden of demonstrating purposeful discrimination, citing Griffin v. State, 695 N.E.2d 1010, 1014 (Ind.Ct. App., 1998).

Appellant submits that the mere quest for the orderly, expeditious conduct of a trial should be an insufficient ground to overcome the Ashabraner inference of racial discrimination under the facts of this case, and that it was abuse of discretion to deny Appellant the opportunity to have a juror of his own race serve on the grounds that the juror was slightly late for jury duty. The Record reflects that at the time the issue of Ms. Mabry arose, the parties had not yet commenced their *voir dire* questioning, and that the trial judge did notice when Ms. Mabry entered the courtroom, but failed to ask her whether she had been summoned for jury duty until 35 minutes of general *voir dire* questioning had passed. (Appellant's App., p. 254: 23-26; p. 255: 1-26; p. 256: 1-5; p. 257: 20-25).

Could it not be rhetorically asked whether the trial court's duty to conduct business in an orderly, expeditious manner also included the duty not to wait until 35 minutes of general questioning had passed before asking Ms. Mabry whether she had been summoned for jury duty? Appellant has found no case specifically on point in regard to whether arriving late for jury duty should effectively disqualify a juror from serving, as occurred here. The trial court acknowledged that Ms. Mabry would only serve if all the other jurors, whose numbers were after hers in the pre-assigned queue, were somehow eliminated from consideration. (See Appellant's Reply Brief, pp. 15-16). To hold that such lateness should deprive both the African-American juror and litigant the opportunity for jury service is dangerous precedent indeed, because where is the line to be drawn? Is being one, two, five or ten minutes late, even if this is beyond the control of the prospective juror (an issue never explored in this case) enough to deprive the prospective juror of his or her constitutional right to participate in the judicial process? In Holt v. State, (1977) 266 Ind. 596, 365 N.E.2d 1209, the Indiana Supreme Court noted that the discretion to excuse prospective jurors must not be exercised illogically or arbitrarily. Appellant submits that the trial court's removal of Ellen Mabry from the pre-assigned queue of potential jurors and failing to offer her the chance to serve as a juror because she was slightly late was arbitrary and illogical.

Excerpt From pp. 9-11 of Petitioner's Brief in Support of Petition To Transfer to the Indiana Supreme Court

IN THE INDIANA SUPREME COURT

CAUSE NO.: 89A04-0102-CV-71

Robert Daniel Hearn,
Husband and Administrator of the
Estate of EvaMae H. Hearn, Deceased,
Appellant, Plaintiff Below,

-vs-

MICHAEL A. HINSHAW, M.D.,
GENERAL SURGEONS, INC., and
REID HOSPITAL & HEALTH CARE
Appellees, Defendants Below.

Filed
Apr 1, 2002
Brian Bishop,
Indiana
Clerk of Courts

Appeal From the Wayne Superior Court
The Honorable John L. Kellam, Special Judge
Cause No. 89D01-9603-CT-012

PETITION TO TRANSFER OF APPELLANT, ROBERT DANIEL HEARN.

Karen B. Neiswinger, Attorney ID#: 10154-49
Attorney At Law
6100 North Keystone Avenue, Suite #235
P.O. Box 551099
Indianapolis, Indiana 46205-1099
Telephone: (317) 251-2250
Fax: (317) 251-2660

Attorney For Appellant, Robert Daniel Hearn,
Husband and Administrator of the Estate of
Eva Mae H. Hearn, Deceased.

* * *

p. 9

B. The trial court abused its discretion by eliminating the only available African-American from service as a juror.

This Court has held that an inference of racial discrimination is established where only one African-American potential juror is struck by the State and a defendant is African American. Ashabraner v. Bowers, 753 N.E.2d 662 (Ind., 2001). Here, the trial court stated twice that it was excusing Ms. Mabry, and that she would only serve if all the other jurors behind her in the pre-assigned numerical queue, all of whom were Caucasian, did not serve. (Appellant's App., p. 254: 8-13; p. 253: 5-22; p. 254: 4-6). The claimed reason was because it would be too inconvenient to repeat the court's general *voir dire* questions. (Appellant's App., p. 254: 10-13; 255: 5-14). The Memorandum Opinion held this was a race-neutral explanation, and therefore, the trial court did not abuse its discretion. Further, the Memorandum Opinion held that Appellant failed to meet his burden of establishing a violation of the Fourteenth Amendment's guarantee of equal protection because Appellant allegedly "concedes" that the basis for eliminating Ms. Mabry was "convenience". (Memorandum Opinion, p. 10). Also, the Memorandum Opinion claims that a party cannot meet its burden of demonstrating purposeful discrimination where the error in selecting the jury was due to a technical problem, and thus, was inadvertent, citing Lyons v. State, 600 N.E.2d 560 565 (Ind.Ct.App., 1992).

Appellant has consistently argued that the exclusion of Ms. Mabry was a violation of equal protection and due process, and that the alleged

inconvenience of repeating a portion of the court's general *voir dire* was an insufficient grounds to deny both him and Ms. Mabry of their constitutional rights of equal protection and due process, and to overcome the inference of racial discrimination. (Appellant's App., p. 255: 16-26; p. 256, all; p. 258: 1-9; motion to correct errors, Appellant's App., pp. 50-51; Appellant's brief, pp. 27-32; Appellant's reply brief, pp. 13-18; Appellant's petition for rehearing, pp. 11-14). What occurred in this case was not a technical problem. Part of the reason Ms. Mabry missed a portion of general *voir dire* is that the trial judge, who admitted on the record that he noticed her enter the court room, made no effort to determine if she had been summoned for jury duty until the bailiff called her to the judge's attention. (See Appellant's App., p. 253: 5-21; p. 254: 23-26; p. 255: 1-14).

In Holt v. State, (1977) 266 Ind. 596, 365 N.E.2d 1209, this Court held that while trial courts have discretionary authority to excuse prospective jurors, this discretion must not be exercised illogically or arbitrarily. The relative inconvenience of repeating the court's preliminary *voir dire* questions, which would not have taken very long with a single venireperson, is an arbitrary and illogical basis for removing the only available African-American potential juror. It is submitted that the argument for expediency fails to overcome the presumption of racial discrimination, and that almost any facts could be alleged to constitute a technical problem or in the interests of expediency, and if any explanation is sufficient to meet the "race neutral" explanation, then the equal protection and due process rights of the Constitution have little meaning. The trial judge should have allowed Ms. Mabry to serve,

and his refusal to do so was an abuse of discretion and a violation of the equal protection and due process rights of both Ms. Mabry and Appellant, justifying reversal. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); Powers v. Ohio, 499 U.S. 400 (1991); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991).

CLERK

Supreme Court, Court of Appeals, and Tax Court

STATE OF INDIANA

217 State House, Indianapolis, IN 46204
317-232-1930 . Fax 317 232-8365

Cause Number
89A04-0102-CV-00071
Lower Court Number:
89D01-9603-CT-12

KAREN ANN NEISWINGER
6100 N. Keystone Avenue, #235
P.O. Box 551099
Indianapolis, IN 46205-1099

WEAVER, JACQUELINE - V- HINSHAW, MICHAEL A., M.D., ET AL

You are hereby notified that the SUPREME COURT has on this day 7/11/02

THIS MATTER HAS COME BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER

JURISDICTION FOLLOWING THE ISSUANCE OF A DECISION BY THE COURT OF APPEALS. THE PETITION WAS FILED PURSUANT TO APPELLATE RULE 57. THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS. ANY RECORD ON APPEAL THAT WAS SUBMITTED HAS BEEN MADE AVAILABLE TO THE COURT FOR REVIEW, ALONG WITH ANY AND ALL BRIEFS THAT MAY HAVE BEEN FILED IN THE COURT OF APPEALS AND ALL MATERIALS FILED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH PARTICIPATING MEMBER HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICE'S VIEWS ON THE CASE IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER OF JURISDICTION.

RANDALL L. SHEPARD, CHIEF JUSTICE

ALL JUSTICES CONCUR

Witness my name and the seal of said Court
this 11th day of July, 2002.

/S/ Brian Bishop
Clerk Supreme Court, Court of Appeals and Tax Court

Amendment VI To the Constitution of the United States of America

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall

have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV To the Constitution of the United States of America–Section 1.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.